90-1490

Supreme Court, U.S.
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NO. 90-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CELOTEX CORPORATION,
Petitioner,

v.

LLOYD D. KING, LOUAN KING, A. B. WILLIS, MOLLY WILLIS, CLETUS GRESHAM, LARRY JONES, BESS JONES, JOHNNY FOWLER, AND MARY MARBLE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ALBERT L. MARBLE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether multiple awards of punitive damages against a defendant for a single course of conduct violate due process because:

   a. multiple awards of punitive damages lack a rational basis and offend basic concepts of fairness and justice;

   b. the procedures by which multiple awards of punitive damages are imposed are void for vagueness; and

   c. there are no meaningful standards which control the imposition of multiple punitive damage awards.

2. Whether a statement made during closing argument that is based on erroneously admitted, but uncontroverted, hearsay evidence constitutes a judicial admission which waives all hearsay objections to the evidence.

LIST OF ALL PARTIES

Petitioner in this proceeding is The Celotex Corporation, which was the only appellant in the court below. The parent corporation of Celotex is The Jim Walter Corporation and the only subsidiary of Celotex is Carey Canada, Inc., which is a wholly owned subsidiary. Respondents are all of the appellees in the court below and include:

Lloyd D. King
Louan King
A. B. Willis
Molly Willis
Cletus Gresham
Larry Jones
Bess Jones
Johnny Fowler
Mary Marble

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LLOYD D. KING, LOUAN KING, A. B. WILLIS, MOLLY WILLIS, CLETUS GRESHAM, LARRY JONES, BESS JONES, JOHNNY FOWLER, AND MARY MARBLE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ALBERT L. MARBLE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner The Celotex Corporation ("Celotex") files this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to modify the judgment below or, alternatively, to vacate the judgment and remand the case for further proceedings.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 906 F.2d 1022 and is included as Appendix A. The district court did not issue a written opinion but its Judgment is included as Appendix D.

JURISDICTION

The United States Court of Appeals entered an order on July 12, 1990, affirming the decision of the district court (App. B). A timely petition for rehearing and suggestion for rehearing *en banc* was filed by Celotex and overruled on August 31, 1990 (App. C). On October 12, 1990, Celotex filed a voluntary petition in bankruptcy under chapter 11 of Title 11, United States Code (App. E). Respondents filed a motion to lift the automatic stay created by 11 U.S.C. § 362 in this proceeding which was granted by the bankruptcy court by order entered January 10, 1991 (App. F).

This Court's jurisdiction is invoked under 28 U.S.C. § 1241(1) as extended by 11 U.S.C. § 108(c).[1] Jurisdiction in the district court was based on 28 U.S.C. § 1332(a).

STATUTES INVOLVED

This petition invokes the Due Process Clause of the fifth amendment to the United States Constitution, which provides in relevant part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . . " The petition also invokes the similar provisions of the fourteenth amendment to the United States Constitution.[2]

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1. The order lifting the stay granted Celotex 55 days from the date of the order to file its petition for writ of certiorari. Despite this extension, Celotex has filed its petition within the time set forth in § 108(c) of the Bankruptcy Code, 11 U.S.C. § 108(c).

2. Both the fifth and fourteenth amendments are involved in this due process challenge because both federal and state authorities are at issue. This case was brought in federal court based on diversity of citizenship and was tried under federal procedural law and Texas substantive law.

STATEMENT OF THE CASE

This case presents two issues of national significance in the trial of civil cases. First, this case presents the issue of whether repeated punitive damage awards based upon a single course of conduct by one defendant violates due process. The proliferation of products liability,[3] toxic tort, and mass disaster litigation in the last twenty years has given rise to significant due process concerns related to the repeated imposition of compensatory and punitive damages, as recognized by several federal courts including this Court. *See Browning-Ferris Indus., Inc. v. Kelco Disposal Co., Inc.*, 492 U.S.____, ____, 109 S. Ct. 2909, 2921, 2923, 2925 (1989) (Blackmun, J., concurring; Brennan and Marshall, J.J., concurring; O'Connor and Stevens, J.J., concurring in part and dissenting in part); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring). The petition also raises important issues concerning the use and scope of statements of trial counsel as admissions in federal court, a matter last addressed by this Court in *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261 (1880).

This action involves seven consolidated suits alleging personal injury or death arising out of alleged exposure to asbestos-containing insulation products. All defendants except Celotex settled prior to verdict. The jury answered

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3. Recognizing the asbestos litigation crisis facing the federal courts, Chief Justice Rehnquist has appointed an Ad Hoc Committee on Asbestos Litigation to evaluate the problems created by the flood of asbestos litigation and to make certain recommendations. Although this step is valuable and worthwhile in addressing solutions for future asbestos litigation, it cannot address the due process deprivations, such as that suffered by Celotex in the present case, which have already occurred. This Court is the forum of last resort for past constitutional violations.

special interrogatories and rendered a verdict awarding both compensatory and punitive damages in favor of Respondents. Celotex objected to an award of punitive damages because Celotex had repeatedly been subjected to punitive damage awards for the very same conduct that formed the basis of the allegations against Celotex in the instant case—the sale of insulation products which contained some asbestos fibers manufactured by a predecessor of Celotex.[4] Celotex submitted affidavit evidence to the district court that established the number and amount of awards of punitive damages against Celotex in the context of asbestos-related personal injury claims as well as the evidence of Celotex's conduct upon which the prior punitive awards were based (App. G - K).

At the time of the trial in this case, Celotex was a defendant in approximately 65,000 personal injury or wrongful death cases based on alleged exposure to asbestos-containing products manufactured or sold by Celotex or its predecessor. New lawsuits were being filed against Celotex at the rate of 1,600 per month, and the majority of those lawsuits sought punitive damages. As of August 31, 1988, Celotex had disposed of approximately 27,000 asbestos-related bodily injury lawsuits. By April 13, 1989, Celotex had paid approximately $250,000,000 in satisfaction of verdicts and settlements of the asbestos-related personal injury claims filed against it, almost double its net worth as of August 31, 1988. In just six months, from September 1, 1988 to February 28, 1989, approximately 140 judgments were returned against Celotex in asbestos-related personal injury

4. Celotex does not present in this petition any issue relating to the constitutionality per se of punitive damage awards based on the conduct of a predecessor corporation.

cases totalling $15.5 million in compensatory damages and $10 million in punitive damages.[5] Evidence at trial demonstrated that Celotex had approximately 5000 employees (Tr. VII: 1706-1707).

Virtually all of the asbestos-related bodily injury cases filed against Celotex involve the same allegations and arise out of the same course of conduct: the manufacture and sale of insulation materials by Celotex and its predecessor. Many of the trials include the same witnesses and the same deposition testimony on liability issues (App. I-K). Each award of punitive damages is another attempt to punish Celotex for a single course of conduct.

At the trial of this case, Respondent Mary Marble was permitted to introduce into evidence (over Celotex's hearsay objections) a typewritten "product list" which was the only evidence of exposure by her husband to products manufactured by Celotex or its predecessor. (A transcript of relevant portions of her testimony is

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5. The onslaught of existing judgments and the avalanche of new lawsuits had their inevitable effect on October 12, 1990, when Celotex sought protection of the bankruptcy laws (App. E). Celotex joins at least a dozen other companies who have been forced into bankruptcy since 1982 due to the unprecedented wave of lawsuits arising out of the asbestos litigation crisis. *In re Johns-Manville Sales Corp.*, No. 82-B-11656 (Bankr. S.D.N.Y.); *In re The Manville Corp.*, No. 82-B-71676 (Bankr. S.D.N.Y.); *In re Amatex Corp.*, No. 82-05220K (Bankr. E.D. Pa.); *In re U.N.R. Indus.*, No. 85-C-3532 (Bankr. N.D. Ill.); *In re Forty-Eight Insulations, Inc.*, No. 85-B-5061 (Bankr. N.D. Ill.); *In re Standard Insulation*, No. 86-03413-141 (Bankr. W.D. Mo.); *In re Nicolet, Inc.*, No. 87-35745 (Bankr. 5061 (Bankr. N.D. Ill.); *In re Standard Insulation*, No. 86-03413-E.D. Pa.); *In re Raymark Indus., Inc.*, No. 88-21315 (Bankr. E.D. Pa.); *In re Walter Indus.*, No. 89-9745-8P1 (Bankr. M.D. Fla); *In re The Raytech Corp.*, No. 5-89-00293 (Bankr. D. Conn.); *In re National Gypsum*, No. 3-90-32713-F11 (Bankr. N.D. Tex.); *In re Eagle-Picher Indus., Inc.*, No. 1-91-00100 (Bankr. S.D. Ohio).

included in Appendix L.) Mrs. Marble testified that her husband had prepared a handwritten list of products to which he believed he had been exposed after he had spoken to co-workers about the products he had used. Mr. Marble died prior to trial and his wife and daughter purportedly prepared the typewritten list from the handwritten list several months after his death. The original handwritten notes were destroyed without being made available to Celotex and the typewritten list was not provided to Celotex until almost two years after Mr. Marble's death. The typewritten product list was at least triple hearsay, and Celotex never had an opportunity to examine the handwritten document on which it was based or to cross-examine the person who wrote the list or those co-workers on whose knowledge the list was based. The jury affirmatively found that Mr. Marble was exposed to asbestos-containing products of Celotex and its predecessor.

The Fifth Circuit did not address the admissibility of the product list as an exception to the hearsay rule because it found that Celotex had admitted that Mr. Marble was exposed to its products. This "admission" was based upon a statement by Celotex's counsel in closing argument to the jury. The statement was in turn based upon the recognition that the product list was in evidence even though it was incompetent hearsay. Thus, Celotex did not concede that exposure to its products occurred. Instead, Celotex found itself forced to argue the record that was presented to the jury, which included the erroneously-admitted Marble product list. In light of the inclusion of the product list in evidence at the time of closing argument, Celotex could not ignore that undisputed, albeit incompetent, evidence.

REASONS FOR GRANTING THE WRIT

I. MULTIPLE AND REPEATED AWARDS OF PUNITIVE DAMAGES AGAINST CELOTEX FOR A SINGLE COURSE OF CONDUCT VIOLATE CELOTEX'S DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION

This Court stands as the sole refuge for Celotex which, like most of its brethren in the building materials industry, is beseiged by an unending onslaught of asbestos-based lawsuits. Because of a single course of conduct engaged in by Celotex's corporate predecessor in making and selling asbestos-containing building materials many years ago, Celotex's very existence is threatened by its exposure to multiple awards of punitive damages, each aimed at this same course of conduct.

These unending awards of punitive damages, of which this case is but one, violate Celotex's due process rights under the fifth and fourteenth amendments to the United States Constitution. A writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit to vacate that portion of the judgment below awarding punitive damages to respondents. Only by this mandate can Celotex's due process rights be preserved.

This Court has stated that, in certain instances, punitive damages may threaten a litigant's right to due process. *Browning-Ferris Indus., Inc. v. Kelco Disposal Co., Inc.*, 492 U.S.____, ____, 109 S. Ct. 2909, 2921, 2923, 2925 (1989) (Blackmun, J., concurring; Brennan and Marshall, J.J., concurring; O'Connor and Stevens, J.J., concurring in part and dissenting in part); *Bankers Life*

and Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring). The repeated award of punitive damages for a single course of conduct creates a stark example of a failure to provide due process.

The Fifth Circuit did not directly reject Celotex's due process challenge but instead recognized it and then, with misgivings, held that the panel was bound by prior *en banc* Fifth Circuit precedent which rejected earlier, albeit nonconstitutional, challenges to punitive damages in mass torts. *See* 906 F.2d 1022, 1033, citing *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985) *(en banc) ("Jackson II")* and *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986) *(en banc) ("Jackson III")*. Indeed, the panel opinion below seemed to accept Celotex's basic due process premise before holding that the panel was bound by precedent to deny Celotex the relief it sought:

> It must be said that a strong arguable basis exists for applying the due process clause of the United States and Texas Constitutions to a jury's award of punitive damages in a mass tort context.
>
> The distinctive argument the appellant makes in this case does not relate to the components of procedural due process or even to the amount of punitive damages the jury awarded in this case. Instead the appellant argues that punitive damages are so inappropriate in mass tort litigation, because now they are irrelevant to the policy reasons for punitive damages, that they constitute a violation of due process.
>
> Unfortunately, no legislative solution exists for the problem of determining punitive damages in the context of mass tort litigation. The United States Supreme Court . . . has left the door open for a hold-

> ing that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private persons. . . . With some misgivings, the panel holds that it is bound by the *Jackson II* and *III* cases.

906 F.2d 1022, 1031, 1032, 1033. Another panel of the Fifth Circuit, likewise constrained by precedent, nevertheless recognized with sobering accuracy the practical consequences of its decision:

> As for Celotex's pleas for relief from the onslaught of serial punitive damage awards, we can only echo *King*'s "misgivings" that no due process or legislative remedy is available in this circuit.
>
> If no change occurs in our tort or constitutional law, the time will arrive when Celotex's liability for punitive damages imperils its ability to pay compensatory claims and its corporate existence. Neither the company's innocent shareholders, employees and creditors, nor future asbestos claimants will benefit from this death by attrition.
>
> With our own misgivings, we AFFIRM.

Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990). Three weeks after the Fifth Circuit's decision in *Edwards*, the panel's prediction was fulfilled when Celotex went into bankruptcy.

A. MULTIPLE ASSESSMENTS OF PUNITIVE DAMAGES IN MASS TORTS VIOLATE DUE PROCESS GUARANTEES OF FAIR PLAY AND SUBSTANTIAL JUSTICE

The fifth and the fourteenth amendments provide, in part, that no person shall be deprived of life, liberty, or property "without due process of law". U. S. Const.

amend. V, XIV. Celotex, as a corporate citizen of the United States, is entitled to full due process protection even in a civil context. *Lassiter v. Department of Social Serv.*, 452 U.S. 18, 24 (1981); *First National Bank v. Belotti*, 435 U.S. 765, 780 (1978).

At its most fundamental level, the constitutional guarantee of due process requires that all judicial proceedings must follow a scheme of ordered justice reflecting traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See Brock v. North Carolina*, 344 U.S. 424 (1953). These fundamental due process values—that the state may only authorize the taking of a citizen's property in a proceeding that is both fair and rational—are most acutely violated in the sad struggle for survival faced by Celotex and its employees. To weigh the fairness and rationality of the proceedings below, this Court must weigh the purposes purportedly served by punitive damages against the detriment caused by such assessments.

As this Court has held on numerous occasions, punitive damages are not intended to compensate an injured plaintiff, but rather are intended to punish the defendant and deter him and others from similar extreme conduct. *City of Newport v. Fact Concerts*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish . . . and to deter . . . ."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (Punitive damages are "private fines levied by civil juries to punish . . . and to deter . . . ."); *accord, Ratner v. Sioux Natural Gas Corp.*, 719 F.2d 801 (5th Cir. 1983); *Maxey v. Freightliner*, 665 F.2d 1367 (5th Cir. 1982); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981); *Cotton v. Cooper*,

209 S.W. 135 (Tex. Comm'n App. 1919, opinion adopted). While early cases seem to allow a jury to award punitive damages as quasi-compensation for elements of damages not then allowed by law or considered too remote, *see, e.g., Cole v. Tucker,* 6 Tex. 133 (1851); *Wright Titus, Inc. v. Swafford,* 133 S.W.2d 287, 295 (Tex. Civ. App.—Austin 1939, writ dism'd judgmt cor.); *Wilkes v. Wood,* 1 Lofft 1, 98 Eng. Rep. 489 (1763), the modern law of tort damages, which embraces many once-rejected damage elements, has relegated the quasi-compensatory nature of ancient punitive damage cases to the dustbin of history. *See generally Burk Royalty Co. v. Walls,* 616 S.W.2d 911 (Tex. 1981); *Ricard v. State,* 390 So.2d 882, 885-886 (La. 1980). *See also Cavnar v. Quality Control Parking, Inc.,* 696 S.W.2d 549 (Tex. 1985).[6]

While punishment and deterrence may be accomplished by an appropriate award of punitive damages in an individual case, the whole notion of punitive damages loses any rational purpose in the context of mass tort

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6. In *The Celotex Corporation v. Tate,* 797 S.W.2d 197, 209 (Tex. App.—Corpus Christi 1990, no writ), an intermediate Texas appellate court cited a Texas Supreme Court decision, *Hofer v. Lavender,* 679 S.W.2d 470 (Tex. 1984), in support of the proposition that the quasi-compensatory purpose of punitive damages still had some viability. Celotex respectfully submits that this intermediate appellate decision misstates Texas law. The supreme court's actual holding in *Hofer v. Lavender* strongly supports Celotex's position that the purpose of punitive damages under Texas law is to punish and to deter, or make an example of, the wrongdoer. 679 S.W.2d at 474. While the *Hofer* opinion does refer to the early Texas precedent for the quasi-compensatory element of punitive damages, it does so without comment as to the current viability of such a view. *Id.* Texas Supreme Court cases subsequent to *Hofer* have continued to articulate the dual purpose of punitive damages as being punishment and deterrence, without reference to any quasi-compensatory purpose. *See, e.g., Cavnar v. Quality Control Parking, Inc.,* 696 S.W.2d 549 (Tex. 1985).

liability such as is presented by the case now before this Court. The massive compensatory burden already borne by Celotex—$250,000,000 as of March 1989—coupled with an additional $15,500,000 in compensatory and $10,000,000 in punitive judgments, more than adequately punishes Celotex for the course of conduct of its predecessor and just as surely deters it and others from engaging in similar conduct.

Concern over the devastating potential effects of multiple punitive damage awards in a mass tort context led Judge Henry Friendly to pen these sadly accurate words in 1967:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the greatest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967).

The concerns expressed by Judge Friendly in *Roginsky* were echoed by Chief Judge Charles Clark of the Fifth Circuit:

> The grave reality of the need to maintain viable enterprises to meet future [asbestos] compensation liabilities to already injured persons and those with latent diseases commands consideration of the whole picture rather than a myopic, mechanical analysis that would look to this cause of action alone and deny that there exist tens of thousands of others, and the potential for many times more.
>
> In the extraordinary circumstances in which [asbestos] litigation is set, the allowance of punitive

> damages is incompatible with and would disrupt the viability of the strict liability cause of action. Moreover, the basic policy objectives of punitive damages are satisfied in this instance by defendant's multiple exposure to compensatory damages. Therefore, punitive damages are inappropriate in these extraordinary circumstances.

Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 524-25 (5th Cir. 1984), *reversed*, 750 F.2d 1314 (5th Cir. 1985) (*en banc*), *modified*, 781 F.2d 394 (5th Cir. 1986) (*en banc*). While neither *Roginsky* nor *Jackson* was decided on due process grounds, both cases reflect proper discomfort with punitive damages being awarded hundreds or even thousands of times against a defendant for a single course of conduct.

The twin aims of punitive damages—punishment and deterrence—are not served by repetitive awards of punitive damages in mass torts. These goals, while legitimate and rational in theory, lose their legitimacy and rationality, and thereby conflict with due process, under the facts presented in this case. As the record in the district court indicates, Celotex has been subjected to tens of thousands of asbestos-related lawsuits, has been adjudged liable for tens of millions of dollars in actual damages, tens of millions of dollars in punitive damages, and by August 31, 1988 had disposed of 27,000 cases at a cost of $250,000,000. In addition, Celotex was adjudged liable for over $1,000,000 in compensatory damages in the present case. It is difficult to rationally believe that the additional assessment of $1,550,000 in punitive damages, as determined by the jury in this case, would be a rational and just punishment.

The deterrence element of the punitive award is even less grounded in a rational purpose in the context of asbestos litigation. Celotex no longer manufacturers any asbestos-containing products (Tr. V: 1044). Its predecessor's principal, though by no means only, asbestos-containing insulation product, Careytemp, became asbestos-free over twenty-one years ago (Tr. IX: 2208). Warning labels were placed on all asbestos-containing products made by Celotex nearly nineteen years ago (IX: 2216-2217). Celotex stopped production of its last asbestos-containing product, a roofing material, in 1984, and has neither made nor sold asbestos-containing products since that time. Finally, legislative and regulatory steps have been taken which completely serve regulatory purposes in this area. While asbestos has been regulated by federal and state governments for many years,[7] regulations have become more restrictive in recent years. In 1975, the federal government announced a partial ban on asbestos, which applied to certain consumer products. *See* 40 Fed. Reg. 48,292 (1975). In 1990, the Environmental Protection Agency promulgated a total ban on the use of asbestos in insulation materials. *See* 40 C.F.R. § 61.150 (1990).

The United States District Court for the District of New Jersey, in *Juzwin v. Amtorg Trading Corp.*, 705

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7. The first, tenative exposure level for asbestos was set at 5 million particles of asbestos per cubic foot of air by the United States Sugeon General in 1938, *see*, U. S. Treas. Dept., Pub. Health Bull. No. 241 (1938), later redefined as 5 million particles of asbestos dust and 50 million particles of total dust per cubic foot of air. *See* Tr. CEL-101-A, CEL-101-B, Tr. III: 683-695; Tr. IX: 2201-2202. Celotex's products always complied with federal and state asbestos regulations in that published studies indicated users were exposed to levels within such government standards. *See* Tr. IV: 759-777; Tr. CEL-301; Tr. IX: 2220-2222. For a more detailed discussion of this issue, *see*, *Lorenz v. The Celotex Corp.*, 896 F.2d 148 (5th Cir. 1990).

F. Supp. 1053, *modified*, 718 F. Supp. 1233 (D.N.J. 1989), picked up where *Roginsky* and *Jackson I* left off, but addressed itself to the problem in due process terms. The *Juzwin* court stated:

> Due process requires more than simply the provision of a judicial proceeding. It requires that any such proceeding be fundamentally fair, and this court concludes that subjecting [asbestos] defendants to the possibility of multiple awards of punitive damages for the single course of conduct alleged in this action would deprive defendants of the fundamental fairness required by the Due Process Clause.
>
> [T]he court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labelled "civil" or "criminal" in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment.

705 F. Supp. at 1064-1065.

Juzwin in turn relied on earlier precedent which called into question the wisdom of serial awards of punitive damages in mass torts. *See In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *cert. denied sub. nom. The Celotex Corporation v. School District*, 479 U.S. 852 (1986); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied sub. nom. Stover v. Rau*, 459 U.S. 988 (1982); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must, therefore, be a limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 526 F.

Supp. 887, 899 (N.D. Cal. 1981), *vacated,* 693 F.2d 847 (9th Cir. 1982), *cert. denied sub. nom. A.H. Robins Co. v. Abed,* 459 U.S. 1171 (1983) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant in a civil action has a right to be protected against double recoveries not because they violate 'double jeopardy' but simply because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process.")

Both because of the realities of tens of thousands of damage lawsuits with their collective millions of dollars in compensatory and prior punitive awards, and because of strict government regulation of this field, no rational purpose is served by the district court's award of punitive damages in this case.

B. TEXAS PUNITIVE DAMAGE LAW VIOLATES DUE PROCESS GUARANTEES AGAINST VAGUENESS AS TEXAS LAW DID NOT FAIRLY APPRISE CELOTEX THAT ITS CONDUCT WOULD SUBJECT IT TO PUNISHMENT

Due process requires that a law must be plainly spelled out so as to warn those who must conform to the law and to guide those who apply it. *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972). This due process guarantee extends to civil as well as criminal proceedings. *A. B. Small Co. v. American Sugar Refining Co.,* 267 U.S. 233, 239 (1925). Regulations and statutes alike "which purport to govern conduct must give an adequate warning of what they command or forbid." *Diebold v. Marshall,* 585 F.2d 1327, 1335 (6th Cir.

1978). These due process requirements apply to statutes, to regulations, and to judge-made or common law. *Bouie v. City of Columbia,* 378 U.S. 347, 352-354 (1964).

Texas law of punitive damages is derived from statute and from common law. Texas' wrongful death statute, Tex. Civ. Prac. & Rem. Code ann. § 71.009 (Vernon 1990), contains an exemplary damage provision. In addition, Tex. Civ. Prac. & Rem. Code ann. § 41.001, *et seq.* (Vernon 1990), governs exemplary damages. In addition to these statutory provisions, Texas jurisprudence contains longstanding case law on punitive damages. *See Cavnar v. Quality Control Parking, Inc.,* 696 S.W.2d 549 (Tex. 1985); *Burk Royalty Co. v. Walls,* 616 S.W.2d 911 (Tex. 1981).

The standard of conduct under each of these authorities which a plaintiff must meet in order to justify an award of punitive damages is "gross negligence." *Cavnar v. Quality Control Parking, Inc.,* 696 S.W.2d 549 (Tex. 1985). The district court defined the requisite conduct as that committed:

> willfully, intentionally, or with a callous or reckless and heedless disregard and indifference to the rights and welfare of the plaintiffs . . . .
>
> A heedless and reckless disregard means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare or safety of the persons affected by it.

(Tr. X: 2489). Such a standard is tantamount to no standard at all, at least in terms of the due process requirement of fairly apprising the defendant of what conduct is pro-

hibited. There is nothing in the definition of "gross negligence" that suggests any guidelines for the imposition of punitive damages. *See United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). *See also Giacco v. Pennsylvania*, 382 U.S. 399, 403-404 (1966).

As the record in this case demonstrates, asbestos was a common, accepted ingredient in building materials in general and insulation products in particular throughout the 1940's, 50's, 60's and early 70's. Throughout this entire period, time-weighted average exposures to asbestos of up to 5 million particles of asbestos per cubic foot of air were accepted by federal, state and foreign regulations. *See, e.g.*, U.S. Treas. Dept., Pub. Health Bull. No. 241 (1938); Ohio Dept. Health, Reg. 247 (1946); Tex. Dept. Health, Rule OH-13-2 (1958); 25 Fed. Reg. 1543 (1960) (Codified at 29 C.F.R. Sub. A) (proposed February 20, 1960); 25 Fed. Reg. 13,809 (1960) (Codified at 41 C.F.R. Pt. 50-204) (proposed December 28, 1960); Tex. Dept. Health, Occup. Health Reg. No. 3 (1971). *See also*, Tr. III: 663-695; Tr. IV: 759-777, Tr. IX: 2125-2127. Indeed, not only was asbestos accepted during this period, its use was required in military insulation by the federal government. *See, e.g.*, Mil. Spec. 32C11 and SS-C-466; War Production Board Bulletin, June 20, 1944. No regulation required any sort of a warning label on asbestos products prior to 1972. *Cf.* OSHA Asbestos Regulations, 29 C.F.R. § 1910.1001, *et seq.* (1972). Finally, strict products liability, the theory under which the present case was brought, was not recognized as a legal theory during virtually all of the period during which these plaintiffs claim exposure to asbestos-containing products. *See generally* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1099 (1960). Texas did not adopt strict products liability until 1967.

Shamrock Fuel & Oil Sales Corp. v. Tunks, 416 S.W.2d 779 (Tex. 1967). Thus, when Philip Carey followed the pattern of conduct which forms the basis of this action, it is inconceivable that it could reasonably have known that its conduct was contrary to law such as to subject it or its successor to such tremendous punitive liability as has been visited upon Celotex.

The gravamen of plaintiffs' punitive damage case against Celotex centered on the knowledge of asbestos hazards allegedly held by or available to Celotex's predecessor, the Philip Carey Corporation, in the period prior to Celotex's 1972 acquisition of Philip Carey. The laws of gross negligence and of product liability at the time Philip Carey Corporation made its corporate decisions to market asbestos-containing insulation products were insufficient to put Philip Carey on notice that it or its corporate successor would be a defendant in over 90,000 cases and that millions of dollars in punitive damages would be awarded against it.

This very line of reasoning was recognized by Justice O'Connor, joined by Justice Scalia, in a concurring opinion in *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 76-80 (1988). Justice O'Connor discussed the due process limits which must be imposed on punitive damage awards and noted that, where the laws of a state do not adequately warn a defendant of the monetary consequences of an action, those laws violate the due process clause. *Id.* at 88. It would be disingenuous to suggest that the mere existence of a punitive damage/gross negligence cause of action under Texas law forty or fifty years ago, coupled with a theoretically permissible product liability action based on negligence during the same time periods, could fairly put Philip Carey on notice that it or

its successor's very existence would be threatened by asbestos-related punitive awards some four decades or more later.

C. THE DISTRICT COURT'S AWARD OF PUNITIVE DAMAGES DEPRIVES CELOTEX OF DUE PROCESS BECAUSE SUCH AWARD WAS GOVERNED BY INADEQUATE GUIDELINES

In discussing the manner in which a jury awards punitive damages, the court below erroneously focused on the requirements of Texas law that punitive damages be reasonably proportioned to actual damages. 906 F.2d at 1029-1030. Although this is a correct statement of Texas law, *see, Wright v. Gifford-Hill & Co.,* 725 S.W.2d 712, 714 (Tex. 1987); *Alamo Nat'l Bank v. Kraus,* 616 S.W. 2d 908, 910 (Tex. 1981), it misses the point of Celotex's due process challenge. There must be safeguards in place in any proceeding which ensure that it complies with fundamental fairness, *see, International Shoe Co. v. Washington,* 326 U.S. 310 (1945), and that the result is not arbitrary, regardless of the fairness of the proceeding itself. *Daniels v. Williams,* 474 U.S. 327, 337 (1985) (Stevens, J., concurring). The fact that punitive damages in an individual case must be reasonably proportioned to the actual damages awarded does nothing to address the present deprivation of due process, which is visited upon Celotex by the avalanche of punitive awards, not on the proportionality of them as individual figures. Limits such as the one now imposed by Texas law,[8] which focus only

8. Tex. Civ. Prac. & Rem. Code ann. § 41.007 (Vernon 1990) provides "except as provided by Section 41.008, exemplary damages awarded against a defendant may not exceed four times the amount of actual damages or $200,000, whichever is greater." This statutory provision was not applicable to the present case because it became effective after the trial of this case.

on the individual case and not upon the aggregate effect of multiple punitive awards, leave Celotex without an adequate remedy. Likewise, review by the district court and the court of appeals is of little comfort, especially when such courts are hamstrung by case law and statutes ill-designed to address mass-tort due process deprivations. Indeed, the Fifth Circuit in reviewing Celotex's due process challenge to the punitive assessment in the present case did not so much reject Celotex's challenge as hold that the court was bound by prior precedent which prevented such consideration. 906 F.2d at 1033. Obviously, no safeguard is available to Celotex under current law to prevent the due process deprivation from which it now suffers.

II. A STATEMENT MADE BY COUNSEL DURING CLOSING ARGUMENT BASED ON IMPROPERLY ADMITTED, BUT UNCONTROVERTED, EVIDENCE IS NOT A JUDICIAL ADMISSION

The Fifth Circuit held that, during closing argument, counsel for Celotex judicially admitted that Mr. Marble had been exposed to its products. The statement of counsel could not have been a judicial admission because it was based upon the evidence being submitted to the jury, which included the erroneously admitted Marble material list—an unverified, triple hearsay document which was the only evidence of Mr. Marble's exposure to Celotex products. The Fifth Circuit's ruling is an improper application of the concept of judicial admissions and is in conflict with decisions of the Third and Ninth Circuits. *Rhoades, Inc. v. United Airlines, Inc.*, 340 F.2d 481 (3d Cir. 1965); *Clark v. City of Los Angeles*, 650 F.2d 1033 (9th Cir. 1981); *cert. denied*, 456 U.S. 927 (1982). Further, the holding presents an important question of

federal law which will gravely affect the conduct of jury trials and, specifically, the preservation of error.[9]

Judicial admissions, while not expressly recognized by the Federal Rules of Civil Procedure, were recognized by this Court in *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261, 263 (1880). Because the effect of a judicial admission is to remove an issue from consideration by the jury, this Court warned that a judicial admission must be more than an unguarded expression or ambiguous statement; it must be unequivocal. *Id.*

Because of the conclusive effect of a judicial admission, this Court expressed a high standard for establishing a judicial admission:

> The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. The question in either case must be whether the facts upon which it is called to instruct the jury be clearly established. If a doubt exists as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting and leave the matter to the determination of the jury.

Id. at 263. Applying the law to the *Oscanyan* facts, this Court concluded:

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9. Under Texas law, the plaintiff in a product liability case must show that the product at issue was defective and unreasonably dangerous, that he was exposed to the product, and that such exposure was a producing cause of his injuries. *Gaulding v. Celotex Corp.*, 722 S.W.2d 66 (Tex. 1989); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). Absent the material list, there is no such evidence in this case and Celotex would be entitled to a directed verdict.

> Here there were no unguarded expressions used, nor any ambiguous statements made. * * * He dwelt upon and reiterated the statement of the fact which constituted the ground of the court's action in directing a verdict for the defendant. * * * [10]

Id.

A reviewing court must examine the entire record to determine whether a statement is unequivocal enough to constitute an admission. *Oscanyan,* 103 U.S. at 263; *Whatley v. Armstrong World Indus., Inc.,* 861 F.2d 837 (5th Cir. 1988); *Rhoades, Inc. v. United Airlines, Inc.,* 340 F.2d 481 (3d Cir. 1965). Because of the extreme result caused by a judicial admission—the removal of the issue from the jury—courts are reluctant to find judicial admissions. *Rhoades,* 340 F.2d at 484. *See also Dartez v. Owens-Illinois, Inc.,* 910 F.2d 1291 (5th Cir. 1990); *Hardy v. Johns-Manville Sales Corp.,* 851 F.2d 742 (5th Cir. 1988); *Whatley v. Armstrong World Indus., Inc.,* 861 F.2d 837 (5th Cir. 1988).

The "admission" Celotex allegedly made occurred during closing argument, a critical phase in a trial. The role of the attorney in closing argument is to assist the jury in analyzing, evaluating and applying the evidence in the record. *United States v. Garza,* 608 F.2d 659, 662 (5th Cir. 1979). Counsel is not free to make closing argument without limitation, but is strictly confined to

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10. During opening argument in *Oscanyan,* counsel for plaintiff stated the facts they proposed to prove. Defendant asserted that if true, the facts showed that the underlying contract was void and moved for a directed verdict. The court asked plaintiff's counsel if they admitted the statements were true, and he answered yes. The court directed the jury to enter a verdict for the defendant. The Supreme Court affirmed a district court finding that the statements were judicial admissions.

the evidence in the record at the time of the argument. In light of this duty to argue the record, closing argument is a particularly inappropriate time for isolated statements of counsel to be taken as unequivocal admissions. Viewed in light of the totality of the circumstances, Celotex's isolated statement clearly does not constitute an admission.

The trial court admitted the Marble material list over the objections of Celotex (App. L, Tr. I: 13, 48-50; V: 1159, 1160-1; VI: 1208-1210).[11] The record reveals a complete absence of any indicia of trustworthiness of the Marble list. It was never sworn to by Mr. Marble. Mr. Marble was never questioned concerning the list as he was not present at trial nor was his deposition taken prior to his death. He compiled a list in handwritten form, but only after he had spoken to various unidentified coworkers concerning the products used. Months after Mr. Marble's death (App. L, Tr. V: 1145, 1193-1194), his wife and daughter prepared a list, purportedly from his handwritten list. Mrs. Marble threw away the original handwritten notes. Defendants were never provided a copy of the notes nor was the list provided to defendants until almost two years after Mr. Marble's death. (App. L, Tr. V: 1145, 1193-1194). Due to its nature, Celotex had little

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11. The material list was hearsay under Rule 801 of the Federal Rules of Evidence and should have been excluded under Rule 802. The Fifth Circuit defined the scope of admissibility of product lists in asbestos litigation in *Moore v. Johns-Manville Sales Corp.*, 781 F.2d 1061 (5th Cir. 1986) (Plaintiffs prepared lists showing job history and asbestos products used; because lists merely summarized plaintiffs' trial testimony, and because plaintiffs were present and available for cross-examination, the Fifth Circuit upheld the district court's exercise of discretion in admitting lists. The product list in this case does not meet the criteria set out in *Moore*.

ability to rebut this evidence.[12] Given the uncertainty of the co-worker's memory, and the unequivocal statements of the erroneously admitted material list, Celotex's counsel had no choice; he did what he was required to do. He made his arguments based on the factual record before the jury. *Garza,* 608 F.2d at 662.

The Fifth Circuit's holding takes two sentences of counsel's jury argument out of context and finds them to be a judicial admission. 906 F.2d at 1024-1025. In fact, counsel for Celotex began by stating:

> All that we want, all of us, want you all to do is be reasonable and be fair *in looking at the evidence* and in rendering your verdict, and we know you all are going to do that.

(App. L, Tr. X: 2398 (emphasis added)).

Counsel went on to argue:

> I want to talk about the issues and then go through my boards *and kind of take you all through the evidence.* Mr. Houston kind of showed you all the verdict form that you all are going to have to answer. Question one is about injury, and I'll talk about that in a couple of minutes. Question two is were

12. The alleged authors of the document were the deceased Mr. Marble and unidentified co-workers, none of whom could be cross-examined. Whether the product list might or might not have been admissible under *Moore,* had Mr. Marble or the co-workers provided its predicate, is conjecture at best. On the naked record before the court, the predicate for admissibility was simply not laid. Tainted with the hearsay information provided by co-workers (App. L, Tr. V: 1193-1194), this document cannot be salvaged by even the most tortured reading of Rule 804(b)(2). The only other evidence of Marble's exposure was the testimony of an occasional co-worker who could only say that he could not recall using Celotex's products on those jobs (App. L, Tr. V: 1066).

> they exposed to our products? And, of course, the answer to that one was "Yes," and I agree with that.

(App. L, Tr. X: 2400-2401 (emphasis added)).[13]

Thus, on review of the entire record including Celotex's objections to the material list (App. L, Tr. I: 13, 48-50; V: 1159, 1160-1; VI: 1208-1210), the absence of effective rebuttal evidence (App. L, Tr. V: 1066), and the court's admission of the material list, counsel's statement recognizing the existence of evidence to be submitted to the jury does not constitute an intentional, unequivocal and unambiguous admission of exposure and is therefore not a judicial admission. Counsel's statement would not have been made if the material list had not been erroneously admitted.

It is important to note that the trial judge in this case did not consider the statement of Celotex to be a judicial admission; he allowed the issue of exposure to go to the jury (based, however, on the improperly admitted product list). The trial judge was obviously in a better position than the Fifth Circuit to determine whether Celotex was admitting an element of plaintiff's case. Nor did the plaintiff think that a judicial admission had been made, because the plaintiff did not move for a directed verdict on the issue of exposure. The Fifth Circuit's finding of an admission, based on a single statement from the sterile record of a closing argument,

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13. As the use of the past tense "was" indicates, counsel's statement was a reference to the earlier closing argument of plaintiff's counsel which included the use of the jury charge and plaintiff's suggested answers. The reference to "I agree" was based on the uncontroverted, but improper, Marble product list.

is extremely inappropriate and substantially impairs a party's ability to conduct a trial.

The Fifth Circuit itself has recognized that statements which are a summary of evidence cannot properly be considered as admissions. In *Hardy v. Johns-Manville Sales Corp.*, 851 F.2d 742 (5th Cir. 1988), the court held that statements in an appellate brief were not admissible as an admission exception to the hearsay rule. The court noted that:

> appellate briefs, by their very nature, must confine themselves to making statements not about the facts as they unfolded in the real world, but about *what the trial court record shows* . . . . Appellate briefs may not properly purport to be statements of what the real world facts are, but must rather be statements of what the trial court record reflects.

851 F.2d at 745 (emphasis in the original, citation omitted). The Fifth Circuit reaffirmed this holding in *Dartez v. Owens-Illinois, Inc.*, 910 F.2d 1291, 1293 (5th Cir. 1990), which held that excerpts from a post-trial brief filed by a defendant in another case are not admissible as admissions because the briefs were not real world facts but "were written by attorneys as summaries of evidence adduced at trial."

A closing argument fills exactly the same function. Argument is not a voluntary rendition of what exists in the real world but is by necessity a review of the evidence before the trial court. Because of this limitation, "using statements about record facts as substantive evidence, *i.e.*, to establish the truth of the matter asserted in those statements, is bound to be uncertain in the best of circumstances and dangerously misleading in most others."

Hardy, 851 F. 2d at 745. For that reason, a single statement in a closing argument is not the clear and unambiguous declaration that is properly deemed an admission, and the Fifth Circuit erred in finding an admission by Celotex.

The Fifth Circuit's decision also creates a conflict with decisions of the Third and Ninth Circuits. In *Clark v. City of Los Angeles*, 650 F.2d 1033 (9th Cir. 1981), *cert. denied* 456 U.S. 927 (1982) a group of street vendors sued the city and its police department. At trial, the vendors introduced, over defense objection, a diary which purported to chronicle police harassment. Like the Marble material list, the *Clark* diary was a non-business-record document created for litigation purposes and containing numerous levels of inadmissible hearsay. After the diary's admission, defense counsel made use of and argued from it in closing argument. *Clark*, 650 F.2d 1033, 1038. On appeal, the defendants argued that the diary was inadmissible hearsay. The vendors contended that defense counsel's argument constituted a waiver of the objections.[14] The Ninth Circuit rejected the vendors' argument:

> Reference to evidence admitted over a party's objection does not constitute a waiver of their original objection. Otherwise, a party would unfairly be required to give up its opportunity to convince the jury to find in its favor in order to preserve its right to raise evidentiary issues on appeal. *A party in its closing argument must deal with the evidence which*

14. Although the Ninth Circuit couched the issue in terms of waiver, rather than judicial admission, the issue is essentially the same. *See WIGMORE, Evidence In Trials At Common Law* § 2594 (Vol. 9, 1981); 29 Am. Jur.2d, *Evidence* § 598 (2d Ed. 1967).

> *the jury will consider, including evidence admitted over objection.*

Clark, 650 F.2d 1033, 1038 (emphasis added); *accord*, *Chase Manhattan Bank v. E.B. Rood*, 698 F.2d 435, *reh'g denied*, 703 F.2d 582 (11th Cir. 1983). In *Rhoades, Inc. v. United Airlines, Inc.*, 340 F.2d 481 (3d Cir. 1965), despite counsel's opening statements regarding the value of a damaged airboat, the Third Circuit looked at the entire record to find that counsel's objections to value testimony as well as counsel's pretrial statements indicating that he had no idea of the value were sufficient to support the court's view of no judicial admission. *Id.* at 484-485.

In addition to the conflict with the Third and Ninth Circuits, the Fifth Circuit's holding presents an important question of federal law which will gravely affect the conduct of jury trials and, specifically, the preservation of error. Once evidence is admitted over counsel's objection, counsel should not be required to reurge his objection in closing argument when trying to advise the jury on how to apply the evidence. The Fifth Circuit's decision requires a party to either impugn the decision of the trial court judge through repeated references to erroneous rulings or pretend that the document does not exist or was not admitted into evidence. This places an unreasonable and unrealistic burden on litigants.

CONCLUSION

Due process guarantees that a single party will not be subjected to repeated and multiple punishments in the form of punitive damages for conduct arising from a single course of conduct. The award of punitive damages against

Celotex in this case violates that guarantee. Celotex made no judicial admission of exposure to its products in this case because the statement of its counsel was nothing more than the recognition of improperly admitted hearsay evidence that was before the jury. Because there was no competent evidence that established exposure by Mr. Marble to Celotex products, the award of damages in favor of Mary Marble cannot stand.

Celotex therefore asks that the judgment be modified to deny any recovery for punitive damages or any recovery in favor of Mary Marble or, alternatively, that the judgment be vacated and the cause remanded for further proceedings.

Respectfully submitted,

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ATTORNEYS FOR
PETITIONER

APPENDIX A

Lloyd D. KING, et al.,
Plaintiffs-Appellees,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al., Defendants,

The Celotex Corporation,
Defendant-Appellant.

No. 89-2640.

United States Court of Appeals,
Fifth Circuit.

July 12, 1990.

Rehearing and Rehearing En Banc Denied Aug. 31, 1990.

Action was brought to recover for injuries arising out of the plaintiff's exposure to the defendant's asbestos-containing products. The United States District Court for the Eastern District of Texas, Sam B. Hall, Jr., J., entered judgment on a jury verdict for plaintiffs, and defendant appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) papers tending to show another manufacturer's awareness of the dangers of asbestos were properly admitted; (2) sufficient evidence supported the jury's attribution to defendant of 55% of the causation for plaintiffs' injuries; and (3) the award of $1,550,000 in punitive damages was proper.

Affirmed.

Donald J. Verolancken, Randa L. Duncan, Elizabeth M. Thompson, Houston, Tex., for defendant-appellant.

Paul L. Sadler, Rex Houston, Welborn, Houston, Adkison, Mann & Sadler, Henderson, Tex., for plaintiffs-appellees.

Appeal from the United States District Court for the Eastern District of Texas.

Before WISDOM, POLITZ and JOHNSON, Circuit Judges.

WISDOM, Circuit Judge:

Celotex Corporation appeals a judgment against it in favor of a number of plaintiffs[1] for injuries arising out of the plaintiffs' exposure to the defendant's asbestos-containing products. The plaintiffs were exposed to asbestos dust in the course of their employment by the defendants. After a ten-day jury trial, the jury awarded the plaintiffs $1,897,500 in compensatory damages. In apportioning the degree of responsibility for causing the injury, the jury held that Celotex, the only non-settling defendant,[2] was responsible to the extent of fifty-five percent. The jury also awarded the plaintiffs $1,550,000 in punitive damages against Celotex. We affirm the judgment.

On appeal, Celotex contends: (1) the district court committed reversible error in three of its evidentiary

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1. The plaintiffs are Lloyd King, Louan King, Larry Jack Jones, Bess Ellen Jones, Arthur B. Willis, Jr., Molly Willis, Cletus Gresham, Johnny Edward Fowler, and Mary Marble, individually and for the estate of Albert L. Marble.

2. The settling defendants remained parties to the lawsuit by virtue of Celotex's cross-action for contribution.

rulings; (2) there was insufficient evidence to support the apportionment of fifty-five percent causation to Celotex; and (3) the court improperly awarded punitive damages.

I. Evidentiary Rulings

A. *Admission of the Marble Product List*

[1] Plaintiff Albert Marble alleged that he had been exposed to the asbestos-containing products of Philip Carey Corporation and its successor, Celotex, among others. In 1985 he was diagnosed as having malignant mesothelioma, and in that same year he filed suit against the defendants. Subsequently, in response to the district court's standing order for asbestos cases, he prepared a list by hand detailing his work history and the asbestos-containing products he used on various jobs. He compiled the list from his own memory and from the recollections of his former co-workers. After he finished the list, but before his deposition or the trial, Marble died. His wife and daughter later made a typewritten copy of the original handwritten list and disposed of the original. The two provided the typed list to the attorney handling the case. At trial, the district judge admitted the typed version of the list in evidence over the objection of defense counsel.

Celotex contends that the list is inadmissible hearsay. Arguing that the product list was the only evidence of Marble's exposure to Celotex or Philip Carey products, a necessary element of the plaintiff's case, the defendant seeks reversal of the judgment.

We need not decide whether the list would be admissible under an exception to the hearsay because

Celotex judicially admitted that Marble was exposed to its products. During closing argument, counsel for Celotex discussed the verdict form with the jury. Counsel for the plaintiff had just finished his summation in which he suggested to the jury how it should answer the various interrogatories. Counsel for Celotex addressed the jury and spoke to the issue of exposure:

> "Question 2 is were they exposed to our products. And of course, the answer to that one was 'Yes,' and I agree with that." [3]

By stating to the jury that it could properly answer the question on exposure affirmatively, counsel for the defendant admitted the point. A "party is bound by the acts of his attorney;" [4] Celotex cannot now complain that the district court admitted evidence establishing a fact that it conceded in argument.

B. *The Sumner Simpson Papers*

[2] Sumner-Simpson was the president of the Raybestos-Manhattan Corporation from 1929 to 1953. The "Sumner Simpson papers" consist of correspondence between Simpson and the general counsel for Johns-Manville during the years 1935-1939. The papers tend to show awareness of the dangers of asbestos. No persons employed by Celotex or Philip Carey wrote or received the letters. Celotex objected when the plaintiffs sought to admit the

3. Interrogatory No. 2 asked: "Do you find from a preponderance of the evidence that any of the persons below were exposed to the asbestos-containing products of the Celotex Corporation, to the extent that such exposure was a producing cause of the injury to those persons, or any of them?"

4. *Callip v. Harris County Child Welfare Dep't.*, 757 F.2d 1513, 1522 (5th Cir. 1985).

papers into evidence. The trial court overruled the objection and admitted the exhibit with a limiting instruction.[5] Celotex contends that the papers are inadmissible because they are not relevant to its knowledge and that they are unduly prejudicial.[6] We review the district court's evidentiary ruling under an abuse of discretion standard. An erroneous ruling does not merit reversal of a judgment unless "a substantial right of the party" is affected.[7]

Since *Borel v. Fibreboard Paper Products Corp.*,[8] it has been settled that in asbestos cases "the manufacturer is held to the knowledge and skill of an expert". The manufacturer is "obliged to keep abreast of any scientific discoveries and [is] presumed to know the results of all such advances".[9] Accordingly, the scientific knowledge of one manufacturer may help the plaintiff prove that the dangers of asbestos were discoverable at the time of the plaintiff's exposure to the asbestos.[10]

In *Jackson v. Johns-Manville Sales Corp.*,[11] this Court upheld the trial court's admission of the Sumner Simpson papers in evidence against a manufacturer of asbestos

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5. "[Y]ou are instructed that the deposition testimony of William S. Simpson . . . and Richard Gaze is offered for the limited purpose of showing, if it does, what the industry knew or could have discovered by testing their products."

6. Celotex does not adequately brief the issues whether this evidence should have been excluded on hearsay grounds or for lack of evidence on authenticity. Accordingly, we do not consider them.

7. *LeBoeuf v. K-Mart Corp.*, 888 F.2d 330 (5th Cir. 1989).

8. 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S. Ct. 127, 42 L.Ed.2d 107 (1974).

9. *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 461 (5th Cir. 1985).

10. *Id.*

11. 750 F.2d 1314 (5th Cir. 1985) (*en banc*).

products. Celotex argues that *Jackson* is inapplicable because officers of the defendants in that case, Johns-Manville and Raybestos-Manhattan, generated the correspondence. Celotex overlooks that under *Borel* and *Dartez v. Fibreboard Corp.*, such evidence is relevant to the issue of what knowledge was scientifically discoverable by the industry as a whole at a certain time. That the evidence directly shows "only the knowledge of a nonparty does not affect its relevance . . .".[12] The trial court did not abuse its discretion in admitting this evidence.

C. *Deposition of Richard Gaze*

[3] Richard Gaze worked as a scientist for Cape Industries, a South African company engaged in the mining of raw asbestos. Gaze began his employment with the company in 1940. In 1975, he was deposed in connection with an action in federal court against his employer. The plaintiff in that case alleged injuries from the raw asbestos that Cape Industries sold to his company for processing. Gaze died. The plaintiffs in this case sought to enter Gaze's deposition in evidence to show the state of scientific knowledge in the field. The trial court admitted the deposition in evidence with a limiting instruction.[13]

We find no abuse of discretion and we uphold the trial court's evidentiary ruling under Rule 804(b)(5) of the Federal Rules of Evidence, the residual hearsay exception for unavailable declarants. That rule provides for the admission of

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12. *Dartez*, 765 F.2d at 463.

13. *See* footnote 4.

> (5) [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and adress of the declarant.

There is no dispute that Gaze was "unavailable as a witness" at the time of trial under Rule 804(a)(4). We also find that his testimony possesses "circumstantial guarantees of trustworthiness". As was the case in *Dartez,* Gaze's deposition represents sworn testimony in an adversary proceeding. It is true, as the defendant points out, that the underlying suit for which Gaze was deposed concerned the hazardous effect of raw asbestos. We conclude that this distinction does not affect the trustworthiness or the relevance of the testimony, although it does bear on the weight of the evidence.[14]

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14. "[The] distinction [between raw and finished asbestos] plainly goes more to the weight than to the admissibility of the evidence. A study indicating that exposure to asbestos fibers is likely to cause harm to one group of workers is at least suggestive of the facts that other groups of workers who are also exposed to asbestos fibers face similar dangers." *Jackson,* 750 F.2d at 1318.

But see Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1161 (4th Cir. 1986). The court upheld the trial court's exclusion of

The other elements of Rule 804(b)(5) are satisfied as well. The deposition was offered as evidence of a material fact—the state of scientific knowledge on the dangers of asbestos before the plaintiffs' exposure. Gaze's testimony also has probative value on the state of the art. At the time of his testimony, Gaze was the Executive Director and Chief Scientist of Cape Industries. He became aware of the dangers of breathing asbestos dust when he was first employed. Throughout the 1960's, Gaze discussed the hazards with those who purchased asbestos from his company. The deposition carries the stamp of trustworthiness and its admission into evidence in this case serves the interests of justice.

II. Apportionment of Causation

Celotex contends that the evidence is insufficient to support the jury's finding that Celotex was fifty-five percent responsible for causing the plaintiffs' injuries. The company argues that each plaintiff testified that he was exposed to the asbestos-containing insulation products of several defendants, and that there is no basis for the high percentage of causation the jury attributed to Celotex.[15]

[4, 5] Under Texas law, Celotex is liable only for its share in causing the injury.[16] The burden of allocating

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the Gaze deposition under Rule 804(b)(1). The court found that the defendant/manufacturer of asbestos products would not have a motive to cross-examine Gaze similar to the defendant against whom it was sought to be introduced, a manufacture of asbestos products. The court did not address Rule 804(b)(5).

15. Celotex does not address the allocation of causation with respect to Albert Marble.

After the verdict, Celotex moved for an amended judgment, or in the alternative, a new trial. The court denied the motion.

16. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

causation, however, rests with the defendants, not the plaintiffs.[17] In evaluating Celotex's challenge to the award, "[t]his Court must review all the evidence in the light most favorable to the jury's verdict and must affirm the verdict unless the evidence points 'so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary [conclusion]' ".[18]

[6] The jury had before it substantial evidence of Philip Carey's contribution to the plaintiffs' injuries. During trial, Mr. Gresham testified as to his experience with Philip Carey products, including Air Cell, Alltemp Pipe Covering, and Carey 85 Percent Magnesia Block.[19] With regard to the Philip Carey name, Mr. Gresham testified: "You saw [it] on nearly every job you went on. . . . I used lots of their products".[20] On cross-examination, Celotex's attorney attempted to demonstrate that Mr. Gresham had considerable work experience with other companies' asbestos-containing products. With regard to Owens-Corning Kaylo, for example, Celotex's attorney asked: "[Y]ou used every bit . . . as much Kaylo as you did any product made by my folks, didn't you?" Mr. Gresham responded, "I might have, but I doubt it".[21] Later on cross-examination, Celotex's attorney asked:

> "Did you ever use Eagle-Picher 33 Insulating Cement?" Mr. Gresham: "I don't recall that. I might

17. *Id.*

18. *Whatley v. Armstrong World Indus., Inc.*, 861 F.2d 837, 839 (5th Cir. 1988) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)).

19. Trial Record at 1330-1332.

20. *Id.* at 1326-1327.

21. *Id.* at 1366.

> have". Celotex's attorney: ". . . How about the 43, do you remember that one?" Mr. Gresham: "I don't remember either one of those",[22]

Mr. Fowler's testimony indicated that Philip Carey products were available on virtually every job that he ever worked on.[23] Mr. Willis testified that "Philip Carey is one of the oldest manufacturers of [asbestos-containing] insulation, and I've used it ever since I've been in the trade".[24] Similarly, Mr. King testified, "I've used a whole lot of Philip Carey products".[25] Finally, Mr. Jones testified that he had used Carey 7M-90 Cement and Careytemp Premolded Elbow Insulation.[26]

Of course, Celotex succeeded in proving that other companies were partially liable for the plaintiffs' injuries. The jury responded to this proof by assessing forty-five percent causation against the other companies. A review of the trial record indicates that the evidence was sufficient for a reasonable jury to determine that Celotex was fifty-five percent liable. We uphold the jury's verdict.

III. Punitive Damages

Celotex advances a number of objections to the jury's award of punitive damages. The defendant argues: (A) the plaintiffs irrevocably waived their claims for punitive damages; (B) Celotex should not be liable for punitive damages for the acts of Philip Carey; and (C) the puni-

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22. *Id.* at 1371.

23. *Id.* at 1417.

24. *Id.* at 1463.

25. *Id.* at 1576.

26. *Id.* at 1655.

tive damage awards violate the United States and Texas Constitutions.[27] We reject these contentions.

[7] A. The consolidated cases that were tried in the district court were originally part of the *Jenkins II*[28] class action brought in the Eastern District of Texas. The *Jenkins II* parties agreed to resolve the cases by alternative dispute resolutions (ADR), and a United States Magistrate was appointed Special Monitor to oversee the litigation. If, despite good faith participation in the ADR procedure, no monetary settlement could be reached, the parties' agreement provided for a mini-trial that waived the issues of punitive damages and the state-of-the-art defense.[29] These issues consume substantial resources in virtually every asbestos trial, and much of the evidence submitted in nearly every case is essentially the same. In consideration of the overwhelming number of asbestos cases pending in the Eastern District of Texas, the district court approved the class settlement in the hope that it would expedite resolution of the cases and provide swift justice to present and future litigants.[30]

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27. Celotex also maintains that there was no evidence of gross negligence or recklessness on its part. Celotex does not challenge the jury's finding that recklessness on the part of Philip Carey was proved. Our conclusion that Celotex is liable for damages assessed because of Philip Carey's products renders that challenge moot.

28. The *Jenkins I* class action was certified by the district court in 1985. *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd* 782 F.2d 468 (5th Cir. 1986). *Jenkins II* is a second class action consisting of asbestos cases filed between January 1, 1985 and April 1, 1986. With the sole exception of Celotex, all of the defendants in *Jenkins II* have settled.

29. Under the modified trial format, the only issues were to be exposure, medical costs, and damages.

30. Fed. R. Civ. P. 23(e) provides that court approval is necessary for the dismissal or compromise of a class action.

The ADR procedure turned out to be a failure. The district court found that the parties "failed to meaningfully participate" in the process, removed the cases from the ADR system, and set them for trial. The District Court for the Eastern District of Texas, sitting en banc, approved of this action. Celotex and other defendants petitioned this Court for a writ of mandamus. We denied the writ.

Celotex maintains that the *Jenkins II* agreement was part of the overall *Jenkins* class action agreement, and that the terms of *Jenkins II* are not severable from *Jenkins I*. The *Jenkins I* settlement provides that Celotex pay $93 million to the *Jenkins I* plaintiffs. According to Celotex, this $93 million, to be paid to the *Jenkins I* plaintiffs only, serves as binding consideration for the *Jenkins II* agreement. Celotex further asserts that the *Jenkins II* plaintiffs irrevocably waived their right to seek punitive damages and therefore could not reassert this right at trial. We find that Celotex's position is without merit.

There is no basis for Celotex's assertion that the *Jenkins I* and *Jenkins II* agreements were interdependent. Throughout the proceedings, the district court treated the *Jenkins I* plaintiffs and the *Jenkins II* plaintiffs separately. The district court order approving the dispute resolution procedure for the *Jenkins II* plaintiffs applied only to the *Jenkins II* plaintiffs. Similarly, none of the *Jenkins II* plaintiffs received a share of the $93 million paid to the *Jenkins I* plaintiffs. No language in the *Jenkins II* agreement implied that the *Jenkins I* and *Jenkins II* agreements were interdependent. Because the *Jenkins I* and *Jenkins II* agreements were never combined, there can be no question of their "severability".

We also reject Celotex's contention that the *Jenkins II* plaintiffs irrevocably waived their right to seek punitive damages. The waiver to which Celotex refers was contingent upon the parties' adherence to the terms of the ADR agreement. The settlement incorporating the ADR agreement, approved by an order of the district court, included as a material term a provision that the parties would "negotiate in good faith and make a bona fide effort to resolve each case by negotiation". When the parties materially breached the agreement by failing to negotiate in good faith, the court was empowered to rescind the order and to place the cases back on the regular docket.[31] The district court did not abuse its discretion.

[8] B. Celotex next argues that under Texas law it should not be held liable for the acts of the Philip Carey Corporation, because it purchased the assets of the corporation; it did not merge with the corporation. Celotex's argument is foreclosed by our recent decision in *Aguirre v. Armstrong World Industries, Inc.*[32] In *Aguirre,* Celotex challenged the jury's award of punitive damages against Celotex for the acts of Philip Carey. At trial, however, as in the present case, Celotex did not raise the issue and presented no evidence concerning its corporate history. We therefore refuse to address Celotex's challenge, noting that no "purely legal issue" is presented; "it is all but impossible to determine Celotex's liability without evidence of its corporate history, and if the issue had been raised below the district judge would have had the op-

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31. Fed. R. Civ. P. 60(b)(6). *See also Brown v. Clark Equip. Co.,* 96 F.R.D. 166 (D. Me. 1982).

32. 901 F.2d 1256 (5th Cir. 1990).

portunity to summon further evidence and issue a ruling".[33] We follow that decision today.

[9] *Aguirre* also disposes of a related argument. Celotex argues that the punitive damages awarded against it are contrary to the Texas policy that limits punishment to the party who committed the punishable act. As we did in *Aguirre,* we refer to *Western Resources Life Insurance Co. v. Gerhardt.*[34] To "the extent a policy may be gleaned from *Gerhardt,* that policy turns on the corporate history of the corporate successor".[35] *Gerhardt* states that in the case of *merging* corporations, the successor corporation assumes liability for exemplary damages. Lack of evidence of Celotex's corporate history makes it "impossible to determine whether that policy relieves Celotex of punitive liability".[36] Celotex's challenge fails.

C. Punitive damages necessarily raise questions concerning the eighth and fourteenth amendments of the United States Constitution[37] and the corresponding provisions of the Texas Constitution.[38] Celotex does not

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33. *Id.* at 1258.

34. 553 S.W.2d 783, 787 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.). As noted in *Aguirre,* portions of this opinion, on which we do not rely, were overruled by legislation.

35. *Aguirre,* 901 F.2d at 1258.

36. *Id.*

37. In pertinent part, the 14th Amendment, Section 1 provides: "nor shall any state deprive any person of life, liberty, or property without due process of law". The 8th Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments prohibited."

38. Tex. Const. art. I, § 19: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. art. I, § 13 provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

assert that the punitive damage award in this case is excessive. Rather, Celotex maintains that the punitive damages in this case, when considered with punitive damages awarded in previous, pending, and future cases, constitute excessive, multiple punishment, violative of the due process clauses as well as the excessive fines clauses of both the United States and Texas Constitutions.

[10] (1) In this diversity case we look to the law of Texas. The Texas Constitutional prohibition of excessive fines applies to civil penalties.[39] In Texas, "[a] fine is not unconstitutionally excessive and the courts will not override the legislature's discretion, 'except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind' ".[40]

[11] In tort suits, each jury determines the total amount of damages necessary to punish the defendant and to deter similar conduct. In asbestos litigation, there are thousands of cases against the same group of defendants. Celotex argues that if punitive damages are based on egregious conduct, defendants have been punished thousands of times for the same course of conduct; Celotex has been punished enough. If punitive damages are to deter misconduct, they have exhausted their deterrent effect.

Celotex fails to address the manner in which Texas juries assess punitive damages. Texas law provides that "[e]xemplary damages must be reasonably proportioned

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39. *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980), quoting *State v. Laredo Ice Co.*, 96 Tex. 461, 73 S.W. 951, 953 (1903).

40. *Id.*

to actual damages." [41] Juries calculate compensatory damages case by case. Thus, even though Celotex has paid punitive damages to other plaintiffs in other cases, the punitive damages awarded in those cases have reflected the harm inflicted upon only the plaintiffs in those suits. In the instant case, with respect to each plaintiff, the jury responded affirmatively to an interrogatory asking whether Celotex acted "willfully, intentionally, or with callous or reckless and heedless disregard and indifference to the rights and welfare" of the plaintiff. That affirmative response led the jurors to the next interrogatory, answered separately for each plaintiff: "What sum of money, if any, do you assess as punitive damages for [each plaintiff] against the Celotex Corporation?" [42] The jury here has not attempted to impose punitive damages that disproportionately reflected the harm Celotex has inflicted on the plaintiffs in this case. On this record this Court cannot hold that Celotex has been punished repetitively and so excessively "as to shock the sense of mankind" in violation of the Texas Constitution. Here the jury's award of punitive damages was specifically targeted to Celotex's conduct as it affected each plaintiff.

[12] (2) In this appeal Celotex does not and cannot rely on the eighth amendment proscribing the imposition of "excessive fines" and "cruel and unusual punishments". Nevertheless, a brief discussion of some of the leading cases on the subject is pertinent because of the relevance of excessive fines (punitive damages) to due process. In

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41. *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981). *See also Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987) and *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1377 (5th Cir. 1982).

42. Interrogatories Nos. 17 & 18.

Ingraham v. Wright,[43] Justice Powell, for the Court stated the accepted rule applicable to eighth amendment contentions: The eighth amendment "was designed to protect those convicted of crimes. We adhere to this longstanding limitation". In *Palmer v. A.H. Robins Co.,* the Supreme Court of Colorado relied on *Ingraham* in rejecting the applicability of the eighth amendment to punitive damages assessed against a mass tort defendant, the manufacturer of Dalkon shields.[44] In *Kelco Disposal Co., Inc. v. Browning-Ferris,* the Court of Appeals for the Second Circuit upheld a jury award of $6 million dollars in a case where the jury awarded compensatory damage of only $51,146.[45] The Supreme Court did not decide the issue of whether the award was excessive under the due process clause because that point had not been raised in either the district court or the court of appeals, nor was the award excessive under a federal common law analysis. In the Supreme Court, Justice Blackmun speaking for the Court, considered the Amercement Clause of Magna Carta, the English Bill of Rights, the intention of the Framers of our Constitution, the language of the Excessive Fines Clause, and the nature of our constitutional framework. He stated firmly:

> This Court has never held, or even intimated, that the Eighth Amendment serves as a check on the power of a jury to award damages in a civil case. Rather, our concerns in applying the Eighth Amendment have been with criminal process, and with

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43. 430 U.S. 651, 664, 97 S. Ct. 1401, 1408, 51 L.Ed.2d 711 (1977).

44. 684 P.2d 187 (Colo. 1984).

45, 845 F.2d 404 (2d Cir. 1988), *aff'd,* ____U.S.____, 109 S. Ct. 2909, 2912, 106 L.Ed.2d 219 (1989).

> direct actions by government to inflict punishment. Awards of punitive damages do not implicate these concerns.[46]

Justice O'Connor, in whose opinion Justice Stevens joined, also examined the historical record. She concluded that the Court's recitation of the history of the Excessive Fines Clause was not complete; that in current usage a "fine" comprehends a "forfeiture or penalty recoverable in a civil action"; that punitive damages should be proportional to the offense. Justice O'Connor cited a number of recent articles supporting her position.[47]

No justice took the view that federal common law provides a basis for disturbing the jury's punitive-damage award.

It must be said that a strong arguable basis exists for applying the due process clause of the United States

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46. _____U.S._____, 109 S. Ct. 2909, 2912, 106 L.Ed.2d 219 (1989).

47. Boston, Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause, 5 Cooley L.Rev. 667 (1988); Massey, The Excessive Fines Clause and Punitive Damages: Lessons from History, 40 Vand.L.Rev. 1233 (1987); Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Va.L.Rev. 139 (1986); Note, The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment, 85 Mich.L.Rev. 1699 (1987). *But see* Note, Constsitutional Defenses Against Punitive Damages: Down But Not Out, 65 Ind.L.J. 141 (1989). The note opens with this statement: "The United States Supreme Court this past term dealt a staggering blow to civil litigants wishing to attack awards of punitive damages on constitutional grounds". But the last paragraph reads: "The better challenge to punitive damages has always been the due process clause. It stands on more solid ground substantively, and it provides a better solution to the problems facing business and industry. With a majority of the Court waiting to hear this argument, constitutional challenges to punitive damages have not been set back by *Browning-Ferris*. Instead, the proper arrow may be drawn from the constitutional quiver for an attack that appears stronger than ever." *Id.* at 165.

and Texas Constitutions to a jury's award of punitive damages in a mass tort context. In *Browning-Ferris* Justice Blackmun observed that the parties agreed that due process "imposes some limits on jury awards of punitive damages", but the Court has never addressed the question "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit".[48] The answer "awaits another day". Justices Brennan and Marshall joined in the Court's opinion "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties".[49] Justice O'Connor, joined by Justice Stevens, concluded that the Excessive Fines Clause applied to the States through the Due Process Clause of the Fourteenth Amendment.[50] Justice O'Connor would have remanded the case to the Court of Appeals so that it in the first instance would apply "the Solem framework . . . and determine whether the award of over $6 million imposed on [Browning Ferris] violates the Excessive Fines Clause".[51]

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48. 492 U.S. at____, 109 S. Ct. at 2921.

49. 492 U.S. at____, 109 S. Ct. at 2923.

50. 492 U.S. at____, 109 S. Ct. at 2925.

51. The Court has adopted a proportionality framework under the Cruel and Unusual Punishment Clause. *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L.Ed.2d at 637 (1983). "I would adapt the Solem framework to punitive damages in the following manner. First, the reviewing court must accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil and criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil and criminal penalties imposed by different jurisdictions for the same or similar conduct.

In *Bankers Life and Casualty v. Crenshaw,*[52] Justice O'Connor in a concurring opinion was the first to highlight the due process argument in the context of punitive damages:

> Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think this may violate the Due Process Clause.[53]

Justice Scalia concurred in Justice O'Connor's opinion.

The distinctive argument the appellant makes in this case does not relate to the components of *procedural* due process or even to the amount of the punitive damages the jury awarded in this case. Instead the appellant argues that punitive damages are so inappropriate in mass tort litigation, because now they are irrelevant to the policy reasons for punitive damages, that they constitute a violation of due process.

This Court carefully considered that argument on three occasions in *Jackson v. Johns-Manville Sales Corp.*[54] The

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In identifying the relevant civil penalties, the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions, but also any possible prison term." *Browning-Ferris,* 492 U.S. at____, 109 S. Ct. at 2934.

52. 486 U.S. 71, 108 S. Ct. 1645, 100 L.Ed.2d 62 (1988).

53. *Id.* at 87, 108 S. Ct. at 1655.

54. 727 F.2d 506 (5th Cir. 1984) (*Jackson I*); 750 F.2d 1314 (5th Cir. 1985) (*Jackson II*); 781 F.2d 394 (5th Cir. 1986) (*Jackson III*).

defendant's argument in those cases, however, was not couched in terms of due process. In *Jackson I,* Chief Judge Clark, writing for a panel of this Court considered the "castastrophic nationwide exposure of workers to asbestos", "[t]he grave reality of the need to maintain viable enterprises to meet future compensation liability", the nature of strict liability in Mississippi, the Mississippi law of punitive damages requiring "a showing of wanton, gross, or intentionally wrongful conduct", and concluded that under Mississippi law punitive damages were inappropriate in asbestos litigation. In *Jackson II,* on in banc rehearing, Judge Randall for a majority of nine members of the Court, held that the case was "not an appropriate one for the creation of a federal common law because of the absence of a uniquely federal interest and the practical problems that would attend the displacement of state law".[55] The Court certified to the Mississippi Supreme Court three questions, one of which was:

> whether a Plaintiff whose cause of action is based upon strict liability in tort can recover punitive damages against Defendants who have been or may be subjected to multiple awards of compensatory and punitive damages for the same wrongful conduct.[56]

Chief Judge Clark wrote a strong dissent making essentially the same arguments the appellants make in this case.[57] Judge Clark went into considerable detail in describing the dimensions of asbestos litigation. "By 1981, only eight years after *Borel v. Fibreboard Paper Products*

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55. 750 F.2d at 1327.

56. 781 F.2d at 396.

57. 750 F.2d at 1329.

Corp.,[58] it had far surpassed the number of cases generated by the controversies over Agent Orange, the drug DES, the Dalkon Shield intrauterine device, or even automobile defects".[59] The Mississippi Supreme Court declined certification without discussion.

In *Jackson III*, the Court grasped the nettle, holding that Mississippi law permits punitive damages in product liability matters including "mass tort cases". Again, the "focus of the defendants' argument is that the policies justifying punitive damages in Mississippi are not implicated in the mass tort case" and are "unavailable as a matter of law".[60] (Similarly, in this case the defendant focused its arguments on the policies applicable to awarding punitive damages in a mass tort case.) In the absence of any controlling authority in Mississippi law, the Court looked to the law of other states, concluding that "no appellate court has accepted the defendants' theory in a reported decision".[61] The Court cited the scholarly writing in print at the time, 1986[62] Judge Randall, for the Court, pointed to the inconsistency in a defendant's contending that "in the *most* extreme cases, when a defendant commits an especially pernicious act which injures a myriad of innocent persons, cases which one might imagine to be especially suitable for the imposition of punitive damages, the law should shield the defendant from punitive damages by the sheer magnitude of its

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58. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S. Ct. 127, 42 L.Ed.2d 107 (1974).

59. 750 F.2d at 1336.

60. 781 F.2d at 403.

61. 781 F.2d at 405.

62. 781 F.2d at 406.

wrong".[63] The Court was strongly of the view, as also stated in *Jackson II,* that "Congress' silence in the face of a desperate need for federal legislation in the field of asbestos litigation does not authorize the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions".[64] Chief Judge Clark again dissented, this time suggesting that the Court should have certified the issues, which are a national problem, to the United States Supreme Court; "the problems we face in this litigation are ones of national policy".[65]

In this case, the appellant picks up where Chief Judge Clark left off in the *Jackson* cases, at least in relying on the expansion of the asbestos litigation and the difficulties inherent in allowing multiple punitive damages in mass tort actions. The number of asbestos cases pending against Celotex as of August 31, 1988, according to the appellant's brief, was 65,000 as against filings of 24,000 at the time of *Jackson II*; the rate of new filings against Celotex has more than tripled to 1,600 a month. These figures are in addition to 27,000 cases which Celotex had disposed of, largely by settlement, at a cost of $250,000,000, a figure, according to the appellant, almost twice Celotex's net worth of $149,000,000.

Unfortunately, no legislative solution exists for the problem of determining punitive damages in the context of mass tort litigation. The United States Supreme Court has held that the Excessive Fines Clause of the Eighth Amendment is inapplicable in civil actions, but has left

63. 781 F.2d at 407.

64. 781 F.2d at 415.

65. 781 F.2d at 417.

the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private persons. We have held that in this case, award of punitive damages did not violate the Excessive Fines Clause of the Texas Constitution. With some misgivings, the panel holds that it is bound by the *Jackson II and III* cases: The same arguments that are made here for violation of due process on substantive policy grounds were made in *Jackson I, II, and III* for the inappropriateness of punitive damages in mass tort litigation. We have misgivings, however, because we are acutely conscious of the prophetic words Judge Henry Friendly used twenty-three years ago: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the greatest difficulty in perceiving how claims for punitive damages in such a multplicity of actions throughout the nation can be so administered as to avoid overkill."[66]

The judgment of the district court is AFFIRMED.

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66. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-2640

D.C. Docket No. M85 44 CA con/w 85-213 CA,
M 85 CA M85 100 CA, M85-85-226CA,
M-86-34-CA

LLOYD D. KING, ET AL.,
Plaintiffs-Appellees,

v.

ARMSTRONG WORLD INDUSTRIES,
INC., ET AL.,
Defendants,

THE CELOTEX CORPORATION,
Defendant-Appellant.

(Filed July 12, 1990)

Appeal from the United States District Court for the
Eastern District of Texas

Before WISDOM, POLITZ, and JOHNSON, Circuit
Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to the plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

July 12, 1990

ISSUED AS MANDATE: September 10, 1990..

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-2640

LLOYD D. KING, ET AL.,
Plaintiffs-Appellees,

v.

ARMSTRONG WORLD INDUSTRIES, INC., ET AL.,
Defendants,

THE CELOTEX CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 7-12-90, 5 Cir., 198__, ____F.2d____)
(August 31, 1990)

Before WISDOM, POLITZ and JOHNSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

By: /s/ JOHN MINOR WISDOM
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

NO. M-85-44-CA

LLOYD D. KING AND
LOUAN M. KING, ET AL.

v.

ARMSTRONG WORLD INDUSTRIES,
INC., ET AL.

(Filed April 7, 1989)

THE COURT'S JUDGMENT

On motion of the plaintiffs for Judgment on the verdict of the jury, it is *ORDERED* that Judgment is hereby entered in behalf of the plaintiffs.

It is *ORDERED* that Lloyd King recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $180,000.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Louan King recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $180,000.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that A. B. Willis recover from the Celotex Corporation (Successor to Philip Carey Manu-

facturing Company) the sum of $180,000.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Anna Fowler recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $13,750.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Mary Marble, individually and for the Estate of Albert L. Marble, recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $938,625.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Julie Marble Toland recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $19,250.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Sheri Marble Nanny recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $19,250.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Tina Marble recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $19,250.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Bill Marble recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $19,250.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Molly Willis recover from the Celotex Corporation (Successor to Philip Carey Manu-

facturing Company) the sum of $13,750.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Cletus Gresham recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $487,500.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Gertrude Gresham recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $41,250.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Larry Jones recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $268,750.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Bess Jones recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $13,750.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Johnny Fowler recover from the Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $180,000.00 with interest from this date at the rate of 10% per annum.

It is *ORDERED* that Gertrude Westbrook recover from Celotex Corporation (Successor to Philip Carey Manufacturing Company) the sum of $19,250.00 with interest from this date at the rate of 10% per annum.

It is further ORDERED that all costs are taxed against the defendant, The Celotex Corporation (Successor to Philip Carey Manufacturing Company) and it is the

further Order of the Court that the Clerk shall issue all writs and orders necessary for the full collection and enforcement of this Judgment and all costs.

ENTERED April 3, 1989.

By: /s/ SAM B. HALL
United States District Judge

APPENDIX E

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Chapter 11
Case No. 90-10016-8B1

IN RE: THE CELOTEX CORPORATION,
Debtor.

(Filed Oct. 12, 1990)

VOLUNTARY PETITION

1. Petitioner's mailing address is 4010 Boy Scout Blvd., Tampa, Florida 33607.

2. Petitioner has had its principal place of business or has had its principal assets within this district for the preceding 180 days.

3. Petitioner is qualified to file this petition and is entitled to the benefits of Title 11, United States Code as a voluntary debtor.

4. Petitioner intends to file a plan pursuant to Chapter 11 of Title 11, United States Code.

5. Exhibit "A" is attached to and made a part of this petition.

WHEREFORE, Petitioner prays for relief in accordance with Chapter 11 of Title 11, United States Code.

BUSH ROSS GARDNER
WARREN & RUDY, P.A.
220 S. Franklin Street
Tampa, Florida 33602
(813) 224-9255
Attorneys for Petitioner

By: /s/ JEFFREY W. WARREN
Jeffrey W. Warren
Fla. Bar #150024

I, Kenneth E. Hyatt, as President of the Petitioner named in the foregoing petition, declare under penalty of perjury that the foregoing is true and correct.

Executed on 10-12-90, 1990.

THE CELOTEX
CORPORATION

By: /s/ KENNETH E. HYATT, President
Petitioner

APPENDIX F

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:
THE CELOTEX CORPORATION, et al,
Debtors.

Chapter 11

Consolidated Case Nos.
90-10016-8B1 and 90-10017-8B1

ORDER GRANTING, IN PART, MOTION (1) CHALLENGING JURISDICTION OF COURT OVER PROPERTY OF NON-DEBTORS, (2) TO LIFT STAY WITH REGARD TO CELOTEX APPEALS AND TO RELEASE SUPERSEDEAS BONDS THEREON, AND (3) BRIEF IN SUPPORT

THIS CAUSE came before the Court upon the Motion (1) Challenging Jurisdiction of Court Over Property of Non-Debtors, (2) To Lift Stay with Regard to Celotex Appeals and To Release Supersedeas Bonds Thereon, and (3) Brief in Support, filed by certain Plaintiffs in pending asbestos litigation and appeals, who are represented by the law firm of Wellborn, Houston, Adkinson, Mann & Sadler, of Texas. The Plaintiffs' names are more fully set forth in the text of this Order. The Court, having heard argument of counsel, and being otherwise advised in the premises, finds that the Order should be granted in part and denied in part. It is, therefore,

ORDERED, ADJUDGED AND DECREED that:

1. The Motion Challenging Jurisdiction of Court over Property of Non-Debtors is denied.

2. The Motion to Lift Stay With Regard To Celotex Appeals and to Release Supersedeas Bonds Thereof, is granted, in part, on the terms and conditions set forth below; otherwise, it is denied without prejudice.

3. The stay of 11 U.S.C. § 362 and this Court's Order of October 17, 1990 ("§ 105 Stay Order") are modified as they apply to the appellate case styled *The Celotex Corporation, Defendant/Appellant v. Lloyd D. King and Louan M. King, A. B. Willis, Molly Willis, Cletus Gresham, Gertrude Gresham, Larry Jones, Bess Jones, Johnny Fowler, Anna Fowler, Mary Marble, individually and for the estate of Albert L. Marble, Julie Marble Toland, Sheri Marble Nanny, Tina Marble, Bill Marble and Gertrude Westbrook, Plaintiffs/Appellees ("King Plaintiffs")*, which appeal is currently pending in the United States Court of Appeals for the Fifth Circuit, Case No. 89-2640 (the "King Litigation"). Debtor shall have fifty-five (55) days from the date of entry of this Order to take any action it deems necessary in the King Litigation, including, but not limited to filing a petition for certiorari in the United States Supreme Court. The stay is modified as to the King Litigation and King Plaintiffs such that a final disposition of the appellate case and its underlying Federal District Court litigation shall occur, except as set forth in paragraph 6 of this Order.

4. The stay of 11 U.S.C. § 362 and the § 105 Stay Order are modified as they apply to the appellate case styled *The Celotex Corporation, Defendant/Appellant,*

v. William Earl Glasscock, Roy B. Rhent, Lois T. Ghent, Charles Marsh, Leta Faye Marsh, Charles A. Reich, Gary N. Starkey, Linda Starkey, Gus Geisler, Sr., Lena Geisler, Malvin R. Lane, Nancy Lane, Carlos G. Gonzalez, Delia S. Gonzalez, William E. Smith, Sandra Smith, James W. Phillips, and Barbara E. Phillips, Plaintiffs/Appellee's ("Glasscock Plaintiffs"), which case is currently pending in the United States Court of Appeals for the Fifth Circuit, Case No. 90-4095 ("Glasscock Litigation"). The stay is modified as to the Glasscock Litigation and Glasscock Plaintiffs so that the appeal may proceed to oral argument, which is scheduled the week of February 4, 1991, and may proceed for all other purposes, including appeal to the United States Supreme Court, such that a final disposition of the appellate case and its underlying Federal District Court litigation shall occur, except as set forth in paragraph 6 of this Order.

5. The stay of 11 U.S.C. § 362 and the § 105 Stay Order are modified as they apply to the appellate case styled *Fiberboard Corporation, The Celotex Corporation, et. al., Defendants/Appellants, v. Charles Strong, Nancy Strong, Reuben Pool, Lee Pool, Thomas Sledge, Betty Sledge, Bobbie Freeman, Donna Freeman and Ollie Freeman, Lessie Williams, Ralph Williams, Robert Williams, Carrol Purdy, Murray Williams, Cindy Powdrill, Bobbie Phillips, Emory G.L. Williams and Patsy Fountain, Plaintiff/Appellees* ("Pool Plaintiffs") which case is currently pending in the Court of Appeals for the Sixth Judicial District of Texas at Texarkana, Case No. 06-90-00014-CV (the "Pool Litigation"). Debtor, other Appellants, and the Pool Plaintiffs may proceed so that a final disposition of the appellate case and underlying

state court litigation may be reached, except as set forth in paragraph 6 of this Order.

6. The stay of 11 U.S.C. § 362 and the § 105 Stay Order are not lifted or modified with respect to the supersedeas bonds posted by Debtor in the King Litigation, Glasscock Litigation, and Pool Litigation. The King Plaintiffs, Glasscock Plaintiffs and Pool Plaintiffs may not move to collect on the supersedeas bonds or take any actions as to the supersedeas bonds in those cases without further Order of this Court.

7. By January 4, 1991, counsel for Debtor and counsel for Movants shall file a Legal Memorandum with this Court addressing the issue of whether the supersedeas bonds posted in the King Litigation, Glasscock Litigation, and Pool Litigation are property of the estate and whether the King Plaintiffs, Glasscock Plaintiffs and Pool Plaintiffs may collect on the supersedeas bonds posted in their Litigation if their Litigation is decided favorably to them.

January 10, 1991

By: /s/ THOMAS E. BAYNES, JR.,
Thomas E. Baynes, Jr.,
Bankruptcy Judge

Copies to:
United States Trustee
Jeffrey W. Warren, Esquire
Randolph A. Fabal, Esquire
ANNE/1473

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

LLOYD D. KING, ET AL

v.

RAYMARK INDUSTRIES, INC. and
RAYBESTOS-MANHATTAN, ET AL

NO. M-85-44-CA

(CONSOLIDATED)

AFFIDAVIT

THE STATE OF FLORIDA

THE COUNTY OF HILLSBOROUGH

Before me, the undersigned authority, on this day personally appeared Charles E. Robinson, who being by me first duly sworn, deposed upon oath and said:

"My name is Charles E. Robinson. I am a duly licensed attorney at law and am Corporate Secretary of The Celotex Corporation. As an officer of and attorney for The Celotex Corporation ("Celotex") I am responsible for overseeing asbestos litigation pending against Celotex. I am fully authorized by Celotex to make this affidavit on behalf of the Company.

As of August 31, 1988, Celotex was a defendant in approximately 65,000 lawsuits in which plaintiffs claim

personal injury or wrongful death damages from exposure to asbestos products manufactured and sold by Celotex or its predecessor for ordinary liability, The Philip Carey Manufacturing Company. These asbestos lawsuits have been filed against Celotex in virtually every state of the United States, the Commonwealth of Puerto Rico, and the Territory of Guam. As of August 31, 1988, Celotex had disposed of approximately 27,000 asbestos-related bodily injury lawsuits by settlement, dismissal or judgment.

Punitive or exemplary damages are sought against Celotex in the majority of the asbestos lawsuits that have been filed against Celotex.

Two cases which punitive damages were sought by the plaintiff, awarded by the jury, and paid by Celotex are No. 81-92167, *Leonard Pickett v. Johns-Manville Sales Corp., et al.,* In the Circuit Court of Duval County, Florida, and No. 84-C-1117, and *William M. Carper v. Owens-Corning Fibreglas Corp.,* In the Circuit Court of Kenawha County, West Virginia. *Picket* involved a shipyard insulator who had exposure to Philip Carey asbestos-containing cements. The jury awarded $100, 000.00 against Celotex in punitive damages. That amount has been paid by Celotex. *Carper* involved a worker who was exposed to a wide range of Philip Carey asbestos insulation products. The jury awarded $75,000.00 against Celotex in punitive damages, and Celotex has paid this judgment.

Since October 1, 1988, the following punitive damage awards have been entered against Celotex in asbestos-related personal injury cases.

Plaintiff's name	*Date*	*Court*	*Case No.*	*Amount*
Jack P. Racich	10/ 4/88	USDC ED NY	CV-87-0628	$ 100,000
Jenkins Douglas	10/21/88	Circ. Ct., Duval Cty, Fla.	87-11504-CVA	$ 500,000
Nolberto Aguirre	10/28/88	USDC WD TX	MO-87-CA-274	$ 150,000
Carlos Rosa	11/ 4/88	Circ. Ct. Duval Cty, Fla.	87-11505-CA	$ 250,000
Norman Mercer	11/10/88	Circ. Ct., Madison Ct., Ill.	86-L-1886	$2,000,000
Elbert Baker	11/17/88	Dist. Ct., Boulder Cty, Colo.	86-CV-1489-5	$ 50,000
Charles E. Marple	12/ 1/88	USDC SD OHIO	C-1-86-754	$ 500,000
Robert Cantrell	12/ 1/88	USDC SD OHIO	C-1-86-0599	$ 500,000
John E. Johnson	12/15/88	USDC SD NY	87-CIV-0724	$1,000,000
Theopshiel W. Hergersell	12/20/88	Circ. Ct., Duval Cty, Fla.	87-15421-CV	$ 250,000
Thomas O. Cook	12/20/88	Circ. Ct., Duval Cty, Fla.	87-14866-CA	$ 250,000

Plaintiff's name	*Date*	*Court*	*Case No.*	*Amount*
Hinton F. Haire	12/20/88	Circ. Ct., Duval Cty, Fla.	87-15212-CA	$ 250,000
James E. Stubbs	12/20/88	Circ. Ct., Duval Cty, Fla.	87-14925-CA	$ 250,000
Joseph La Duca	1/11/89	USDC SD NY	87-CV-4294	$ 30,000
Manuel Lucero	1/20/89	USDC D NM	86-0785-JB	$ 35,000
Polly R. Amos	2/ 2/89	USDC MD NC	C-87-431-G	$1,500,000
James E. Ryals	2/ 3/89	Circ., Ct., Duval Cty, Fla.	87-15627-CA	$1,000,000
Robert L. Coker	2/ 3/89	USDC ND GA	86-1954A	$ 50,000
Warren Coker	2/ 3/89	USDC ND GA	86-1955A	$ 50,000
Charles R. Moore	2/ 3/89	USDC ND GA	86-1235A	$ 50,000
Troy H. Manning	2/ 3/89	USDC ND GA	86-680A	$ 50,000
Jennings F. Davis	2/ 28/89	Circ. Ct., Monongalia Cty, W. Va.	86-C-763	$ 40,000

By: /s/ CHARLES E. ROBINSON,
Charles E. Robinson,
Corporate Secretary of
The Celotex Corporation

SUBSCRIBED AND SWORN TO before me on this the 12th day of April, 1989, to certify which witness may hand and seal of office.

By: /s/ BARBARA L. HARRIS
Notary Public in and for
Hillsborough County, Florida.
My commission expires 8/20/89.

APPENDIX H

AFFIDAVIT

COUNTY OF HILLSBOROUGH)
) ss.:
STATE OF FLORIDA)

I, VITO F. SASSONE, on oath depose and state as follows:

1. I, VITO F. SASSONE, am Vice President-Finance, Treasurer and Controller of The Celotex Corporation.

2. That as of August 31, 1988, The Celotex Corporation was a Defendant in approximately 65,000 asbestos-related bodily injury lawsuits.

3. That as of August 31, 1988, The Celotex Corporation had disposed of approximately 27,000 asbestos-related bodily injury lawsuits through settlement, dismissal or judgment.

4. That between September 1, 1988 and February 28, 1989, approximately 140 judgments totaling approximately $15.5 million in compensatory damages and appproximately $10 million in punitive damages were returned against Celotex in asbestos-related bodily injury cases.

5. That to date approximately $250,000,000 has been paid on behalf of Celotex for satisfaction of verdicts and/or settlement of asbestos-related bodily injury cases. To date, two punitive damage judgments in the amount of approximately $175,000 have been paid on behalf of The Celotex Corporation.

6. For the fiscal year ending August 31, 1988, The Celotex Corporation continued to be added as a Defendant in new lawsuits at the rate of approximately 1,600 per month. The majority of these lawsuits contains a claim for punitive damages.

7. According to the financial statements of Celotex, with which I am familiar as of August 31, 1988, the net worth of Celotex was $149 million.

8. That if called too testify to the truthfulness of the foregoing, I could competently and truthfully do so.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ VITO F. SASSONE
Vito F. Sassone

SUBSCRIBED AND SWORN to before me, this 13th day of April, 1989.

/s/ BARBARA L. HARRIS
Notary Public in and for the County
of Hillsborough, State of Florida
My commission expires: 8/20/89

APPENDIX I

THE STATE OF TEXAS)
)
THE COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared Thomas W. Taylor, who being by me first duly sworn deposed upon oath and stated:

"My name is Thomas W. Taylor. I am an attorney at law and am licensed by the Supreme Court of Texas, and am a member of the State Bar of Texas, and the bars of the United States Court of Appeals for the Fifth Circuit, and the United States District Courts for the Northern, Southern, Eastern and Western Districts of Texas.

"I was counsel for The Celotex Corporation ("Celotex") in No. MO-87-CA-274, *Nolberto Aguirre, et al. vs. The Celotex Corporation,* pending in the United States District Court for the Western District of Texas, Midland-Odessa Division. *Aguirre* was a consolidated group of four cases in which each plaintiff claimed to be suffering from the disease of asbestosis. Three of the plaintiffs, Nolberto Aguirre, Guillermo Aguirre, and Antonio Galindo, were career contract insulation workers. They were exposed to asbestos insulation products manufactured and sold by Celotex's predecessor-in-business, Philip Carey, as well as to asbestos products manufactured by other companies. The fourth plaintiff, Carmen Aguirre, was the wife of Guillermo Aguirre. She was exposed to asbestos through household contact with her husband and through laundering his clothes.

At trial, Dr. Joseph K. Wagoner testified on behalf of the plaintiffs as to the "state of the art"—i.e., in his opinion, what was known or knowable concerning asbestos and disease at various points in time. Dr. Wagoner's testimony was virtually identical to that given by him in the *King* case now before this court. In addition, the plaintiffs in *Aguirre* offered the deposition of Dr. Thomas F. Mancuso, a former consultant to Philip Carey. Dr. Mancuso's deposition testimony was in substance the same as that offered by plaintiffs in *King*. Dr. Mancuso's report to Philip Carey was admitted by the Aguirre court. This report was also admitted by this court in *King*. Celotex Corporation's answers to interrogatories were offered by the plaintiffs in *Aguirre*, just as they were offered in King. The *Aguirre* plaintiffs also offered the deposition testimony of Dr. Kenneth Wallace Smith, the former medical director for Johns-Manville. Finally, the plaintiffs in *Aguirre* offered three of the "Sumner Simpson Papers," which were also offered in the *King* case.

"Celotex introduced in *Aguirre* the two exhibits numbered CEL-301 and CEL-302, (letter dated 4/13/61 from Albert Edwards to F.P. Ray and letter dated 11/8/68 from John Cantlon to Michael A. Cojohn), which bear identical numbers in *King*. In addition, Celotex in *Aguirre* offered the deposition of Dr. H. Corwin Hinshaw on state of the art. Dr. Hinshaw's testimony in *Aguirre* was, thus, virtually identical to that offered in King.

"*Aguirre* was tried under Texas law, and the charge was submitted to the jury on special interrogatories.

"The jury in *Aguirre* entered a punitive damage award against Celotex of $150,000.00. The court entered judgment against Celotex for that amount, plus the amount of the actual damages awarded by the jury.

"In summary, the jury in *Aguirre* awarded punitive damages against Celotex on evidence of conduct virtually identical to that before this Court in *King*. The plaintiffs in *Aguirre* were exposed to the same variety of Philip Carey asbestos insulation products over similar periods of time and in identical trades with the plaintiffs in *King*.

/s/ THOMAS W. TAYLOR
Thomas W. Taylor

SUBSCRIBED AND SWORN TO before me on this the 12th day of April, 1989, to certify which witness my hand and seal of office.

/s/ GRETA MOLINE
Notary Public in and for The State of Texas.
My commission expires 5/2/92.

M:/ASB/
TWTA.AFF

APPENDIX J

THE STATE OF TEXAS)
)
THE COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared Karen Beasley Lukin, who being by me first duly sworn deposed upon oath and stated:

"My name is Karen Beasley Lukin. I am an attorney at law and am licensed by the Supreme Court of Texas, and am a member of the State Bar of Texas, and the bars of the United States Court of Appeals for the Fifth Circuit, and the United States District Courts for the Northern, Southern, Eastern and Western Districts of Texas.

"I was counsel for The Celotex Corporation ("Celotex") in No. MO-87-CA-274, *Nolberto Aguirre, et al. v. The Celotex Corporation,* pending in the United States District Court for the Western District of Texas, Midland-Odessa Division. *Aguirre* was a consolidated group of four cases in which each plaintiff claimed to be suffering from the disease of asbestosis. Three of the plaintiffs, Nolberto Aguirre, Guillermo Aguirre, and Antonio Galindo, were career contract insulation workers. They were exposed to asbestos insulation products manufactured and sold by Celotex's predecessor-in-business, Philip Carey, as well as to asbestos products manufactured by other companies. The fourth plaintiff, Carmen Aguirre, was the wife of Guillermo Aguirre. She was exposed to asbestos through household contact with her husband and through laundering his clothes.

"I have reviewed the trial transcript of the case now before this court, *Lloyd King, et al vs. Armstrong World Industries, Inc.*, including the testimony of Dr. Joseph K. Wagoner, the deposition testimony of Dr. Thomas F. Mancuso, the deposition testimony of Arthur Mueller, the deposition testimony of Dr. Kenneth Wallace Smith, the deposition testimony of Dr. Richard Gaze, the deposition testimony of Dr. H. H. Muntz, The Celotex Corporation's answers to interrogatories, and those portions of the transcript dealing with the "Sumner Simpson Papers" and the report of Dr Thomas F. Mancuso to Philip Carey. I am familiar with the "Sumner Simpson Papers" and the report of Dr. Mancuso, and am familiar with the other depositions offered by the plaintiffs in *King*. I am familiar with the testimony of Dr. Joseph K. Wagoner, have seen him testify in other asbestos cases on several occasions, and have cross-examined him at trial.

At the *Aguirre* trial, Dr. Joseph K. Wagoner testified on behalf of the plaintiffs as to the "state of the art"—i.e., in his opinion, what was known or knowable concerning asbestos and disease at various points in time. Dr. Wagoner's testimony was virtually identical to that given by him in the *King* case now before this court. In addition, the plaintiffs in *Aguirre* offered the deposition of Dr. Thomas F. Mancuso, a former consultant to Philip Carey. Dr. Mancuso's deposition testimony was in substance the same as that offered by plaintiffs in *King*. Dr. Mancuso's report to Philip Carey was admitted by the *Aguirre* court. This report was also admitted by this court in *King*. Celotex Corporation's answers to interrogatories were offered by the plaintiffs in *Aguirre*, just as they were offered in *King*. The *Aguirre*

plaintiffs also offered the deposition testimony of Dr. Kenneth Wallace Smith, the former medical director for Johns-Manville. Finally, the plaintiffs in *Aguirre* offered three of the "Sumner Simpson Papers," which were also offered in the *King* case.

"Celotex introduced in *Aguirre* the two exhibits numbered CEL-301 and CEL-302, (letter dated 4/13/61 from Albert Edwards to F.P. Ray and letter dated 11/8/68 from John Cantlon to Michael A. Cojohn), which bear identical numbers in *King*. In addition, Celotex in *Aguirre* offered the deposition of Dr. H. Corwin Hinshaw on state of the art. Dr. Hinshaw's testimony in *Aguirre* was, thus, virtually identical to that offered in King.

"*Aguirre* was tried under Texas law, and the charge was submitted to the jury on special interrogatories.

"The jury *in Aguirre* entered a punitive damage award against Celotex of $150,000.00. The court entered judgment against Celotex for that amount, plus the amount of the actual damages awarded by the jury.

"In summary, the jury in *Aguirre* awarded punitive damages against Celotex on evidence of conduct virtually identical to that before this Court in *King*. The plaintiffs in *Aguirre* were exposed to the same variety of Philip Carey asbestos insulation products over similar periods of time and in identical trades with the plaintiffs in *King*.

/s/ KAREN BEASLEY LUKIN
Karen Beasley Lukin

SUBSCRIBED AND SWORN TO before me on this the 12th day of April, 1989, to certify which witness my hand and seal of office.

/s/ REGINA M. RANSOM
Notary Public in and for The State of The State of Texas.
My commission expires 5/2/89.

M/ASB/
KBLU.AFF

APPENDIX K

THE STATE OF TEXAS)
)
THE COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared Elizabeth M. Thompson, who being by me first duly sworn deposed upon oath and stated.

"My name is Elizabeth M. Thompson. I am an attorney at law and am licensed by the State of Texas and California and by the District of California. I am a member of the bar of the United States Court of Appeals for the Fifth Circuit, and of the bars of the United States District Courts for the Northern, Southern, Eastern and Western District of Texas. I am a partner in the law firm of Butler & Binion.

"I was counsel for The Celotex Corporation ("Celotex") in No. CV 86 0785 JB, *Manuel Lucero vs. The* Celotex Corporation, pending in the United States District Court for the District of New Mexico. Lucero was an insulation worker who claimed to have contracted asbestosis from working with asbestos insulation products manufactured and sold by Celotex's predecessor-in-business, Philip Carey, as well as products manufactured by other companies.

"I have reviewed the trial transcript of the case now before this court, *Lloyd King, et al vs. Armstrong World Industries, Inc.*, including the testimony of Dr. Joseph K. Wagoner, the deposition testimony of Dr. Thomas F. Mancuso, the deposition testimony of Arthur Mueller, the deposition testimony of Dr. Kenneth Wallace Smith,

the deposition testimony of Dr. Richard Gaze, the deposition testimony of Dr. H.H. Muntz, The Celotex Corporation's answers to interrogatories, and those portions of the transcript dealing with the "Sumner Simpson Papers" and the report of Dr. Thomas F. Mancuso to Philip Carey. I am familiar with the "Sumner Simpson Papers" and the report of Dr. Mancuso, and am familiar with the above-described depositions offered by the plaintiffs in *King*. I am familiar with the testimony of Dr. Joseph K. Wagoner, have seen him testify in other asbestos cases on several occasions, and have cross-examined him at trial.

"The evidence offered against Celotex in *Lucero* was substantially similar to that offered in *King*. The *Lucero* plaintiffs introduced the deposition testimony of Dr. Thomas F. Mancuso and Mr. Arthur Mueller, as well as the report of Dr. Mancuso to Philip Carey, Celotex's answers to interrogatories dealing with products, date of warning, and worker's compensation claims, and the "Sumner Simpson Papers." In addition, plaintiffs in *Lucero* offered the videotape deposition testimony of Dr. David Ozonoff. Dr. Ozonoff is a "state of the art" witness, whose testimony was substantially the same as the testimony of Joseph K. Wagoner in *King*.

"Celotex introduced in *Lucero*, among other items, two exhibits, a letter dated 4/13/61 from Albert Edwards to F. P. Ray and a letter dated 11/8/68 from John Cantlon to Michael A. Cojohn. These same exhibits were introduced by Celotex in *King*, and bore exhibit numbers CEL-301 and CEL-302. In addition, Celotex in *Lucero* offered the deposition of Dr. H. Corwin Hinshaw on state of the art. Dr. Hinshaw's testimony in

"The *Lucero* case was submitted to the jury under New Mexico law. The *Lucero* jury returned a verdict in favor of plaintiffs and awarded, in addition to actual damages, punitive damages against Celotex in the amount of $35,-000.00.

"In summary, the evidence of conduct before the jury in *Lucero* was substantially the same as that before the jury in *King*. Both cases involved similar Philip Carey asbestos insulation products used by workers in similar crafts at similar points in time.

/s/ ELIZABETH M. THOMPSON
Elizabeth M. Thompson

SUBSCRIBED AND SWORN TO before me on this the 12th day of April, 1989, to certify which witness my hand and seal of office.

/s/ GRETA MOLINE
Notary Public in and for
The State of Texas.
My commission expires 5/2/92.

M:/ASB/
EMTH. AFF

APPENDIX L

Transcript Excerpts

[13]

The second motion that Mr. Houston addressed is the motion to add four witnesses to the Marble pretrial order. This is of critical importance in that particular case, because to go back on some of the problems that we have with that case, Mr. Marble received a diagnosis of mesothelioma. Mr. Houston contacted the doctors, advised them that he intended to bring this suit and, in fact, he brought this suit.

It was five months later before Mr. Marble passed away. The answers to interrogatories were filed prior to the time Mr. Marble passed away, but no product list, no job history list was provided to the Defendants prior to his passing away.

Nearly two years subsequent to his death, we were provided with a product list and a product history sheet or a job history sheet purporting to be part of his answers to interrogatories. The Defendants have objected to that self-serving purported answers to interrogatories coming in as evidence.

Mr. Houston had the deposition of Mr. Cameron taken on written questions. Mr. Cameron testified to his alleged knowledge of Mr. Marble and the product that he believes Mr. Marble used. We come to the pretrial order time, come to the discovery cutoff time and there are no other witnesses designated.

* * *

[48]

MR. ELLISTON: Your Honor, the big problem with the answers is not so much where he worked, but the list of the products that he claims to have worked with, because that will be the only link between a number of these Defendants and Mr. Marble's case. Without those answers to interrogatories, without that list of products, there will be no evidence against certain of these Defendants. And those Defendants who will be held in this lawsuit on the basis of those--that list alone, would have had absolutely no opportunity to cross-examine Mr. Marble, to test his knowledge of the products, whether they contained asbestos, did he wear a respirator, what were the conditions under which he used those products.

And this was a situation that was not created by the Defendants, because Mr. Marble received his diagnosis of mesothelioma, he contacted Mr. Houston, Mr. Houston contacted Mr. Marble's doctors, and in the letter that's attached to our brief, he says, "I am going to bring a lawsuit." It was five months later before Mr. Marble died. There was a five-month period there, at least, that Mr. Houston had the opportunity to take the deposition of Mr. Marble and prove up the products and give these Defendants an opportunity to cross-examine him.

[49]

During this five-month period, this job history sheet, this product list, was not provided to the Defendants. Even at the time Mr. Houston says that he was going

to take the deposition of Mr. Marble, in January of 1986, this list was not given to the Defendants. This list was not provided to the Defendants until December of 1987. Nearly two years after Mr. Marble died did this list surface.

So, from our standpoint, Your Honor, these Defendants have had no opportunity to cross-examine over these products and really don't have an opportunity to test that, because we questioned Mrs. Marble, she knows nothing about the products that were used. Mrs. Marble did list three or four co-workers that are not listed as witnesses and Mr. Houston did not depose.

Mr. Houston is going to call several people in this trial to testify as co-workers, Mr. Funk and Mr. Meeks. He listed them in Mr. Marble's case. We took their deposition, and they said they didn't know Mr. Marble. We've taken every step to see if there's any evidence out there against us on the products, so that we can question them about whether their description is accurate.

If this list comes in, there's no cross-examination available to us because there's no one to cross-examine. And it would be the only link between Mr.

[50]

Marble and certain of these Defendants. So that's the reason we have such vehement objections to hearsay, self-serving statements that truly were not sworn, because the sworn answers to interrogatories came in in 1985, and it was two years later before the job history list and the work history came in.

THE COURT: All right. Go ahead, sir.

MR. SADLER: Your Honor, I might respond to that that these Defendants have had an opportunity to depose Mrs. Marble concerning this work list and product list, and, of course, she is available here at trial. And I might say at this point, Your Honor, that you're going to have to rule upon, evidentially, a matter that is discretionary with you, I think, and you're going to have some objections to hearsay, and I think it would be beneficial to the Court to hear Ms. Marble's testimony about the product list, how it was made, when it was made, whether or not, at that time, her husband believed he was dying. I think these are all facts that are relevant to whether or not this particular list is admissible.

And so I think it's important, at least, that we reserve our ruling as some such time as we hear her testimony and to hear the other testimony the Plaintiff has to offer concerning that list.

They did have an opportunity to ask her about that

* * *

[1066]

* * *

Q. Did you know Albert Marble during his lifetime?
A. Yes.
Q. When did you first know him?
A. I first met him Christmas week, 1943, with his brother in Shreveport, Louisiana.
Q. Did you know him well?

A. Yes.

Q. Did you work with him on various jobs?

A. Yes.

Q. Name all of the projects you can recall in which you worked either with or around Mr. Marble.

A. At the Skelly Gas Plant in Eunice, New Mexico; at the Pantex Atomic Energy Plant in Pantex, Texas, near Amarillo; Amarillo Air Force Base, Amarillo, Texas; War Memorial Auditorium in Dallas, Texas; Pecos River Compressor Station out of Carlsbad, New Mexico; Colorado City Power Plant, Colorado City, Texas; and at the Cosden Refinery at Big Springs, Texas; and the Sid Richardson Gas Plant at Kermit, Texas; and as business agent on some of the jobs on which he worked.

* * *

[1159]

* * *

MR. ELLISTON: Your Honor, it's the Defendant's objection that this is hearsay as to these Defendants, and we would add a 403 objection to that, in that there is no evidence that this list has been sworn to. As I have understood the testimony today, the answers to interrogatories were sworn to and signed by Mr. and Mrs. Marble prior to January of 1986. This list was not completed until the fall after Mr. Marble passed away, and then it was forwarded to Mr. Houston. It was not provided to the Defendants until December of 1987, which was almost two years after Mr. Marble passed away.

That time period alone raises a question of trustworthiness, plus the additional fact that it was not sworn information by Mr. Marble.

In addition, the voir dire questions have demonstrated that Mr. Marble spoke with several co-workers during the time he was preparing this list; therefore, that raises the question of hearsay being included on this list, and not giving these Defendants an opportunity to cross-examine Mr. Marble about what was hearsay and what was personal knowledge. There's also evidence in this record from Dr. Kitchens' deposition that Mr. Houston

[1160]

contacted him in July, shortly after the diagnosis, July of 1985, six days after Dr. Kitchens saw him.

And in the letter, Mr. Houston tells Dr. Kitchens, "I want to talk to you because I'm going to file a lawsuit against the asbestos companies for this mesothelioma."

It was six months later, or approximately six months later, before Mr. Marble passed away. There were—there was a five-to-six-month period in which Mr. Houston, under the Rules of Federal Procedure, could have taken a deposition to perpetuate testimony. The lawsuit was filed in December of 1985. The deposition could have been taken shortly after the lawsuit was filed, and the Defendants given an opportunity to cross-examine.

We were not afforded that opportunity, and we should not be deprived of the right of cross-examination when the opportunity was available.

Furthermore, in order for any type of information, evidence such as this to come in, there must be no

other reasonable avenue available to the party offering it to get this evidence. Mr. Houston has already provided to this Court and admitted into evidence testimony of a Mr. Cameron who identified six different companies. The witness has identified at least five or six other co-workers who talked to Mr. Marble during the time a list was being prepared. They could have been listed as witnesses. They could have

[1161]

been identified as witnesses, and we could have taken their deposition.

Every person Mr. Houston identified in this case as a co-worker who could testify to products, we took their deposition to find out. And the fact that the Plaintiff doesn't—doesn't want or can't get all of these people in here to prove up every job should not deprive us of the right of cross-examination on this—as you well know, a critical issue. This would be the only link between some of these companies and any liability in this case. And we would be powerless to do any cross-examination.

Another element of the trustworthiness that I would like to address, if you look at the materials list, and you flip each page, you will see there's information concerning the corporate history of these companies.

The Celotex Corporation would be a good one to look at. Celotex Corporation, and then a list of other corporations are listed below it as who Celotex was supposedly the successor of or the owner of. That could not possibly be—or it raises the question that that is not the personal information of Mr. Marble, that that was information provided by their attorney. And to have

that type of information come in on a list from Mr. Marble indicates that all of that information did not come out of his personal knowledge.

* * *

[1193]

A. No, sir.

Q. And as I further understand it, you don't have any knowledge of the manufacturers of the actual products with which Mr. Marble worked on any of the jobs where he worked as an insulator?

A. As an insulator, no, sir.

Q. All right. Now, in preparing the product list that has been introduced into evidence here, Mr. Marble, as I understand it, talked with some of his co-workers, some of the men with whom he had worked on the jobs, in preparing that list; is that correct?

A. Yes, sir.

Q. And, of course, that was a handwritten list that he prepared, as I understand the situation?

A. Yes, sir.

Q. And you helped him with that?

A. Yes, sir.

Q. He talked with Mr. Bill Cameron, Mr. Johnny Williams, Mr. C. W. Siever, and Mr. Jimmy Hedlin, didn't he?

A. Yes, sir.

Q. And the list that's been introduced into evidence here, the list of those products, Mrs. Marble, is a typewritten list. Do you, by chance, have the handwritten list?

A. No, sir. I no longer have it.

[1194]

Q. Do you know what was done with that?
A. I believe I threw it out.
Q. After the list was typed up?
A. Yes, sir. After we made sure that it was accurate.

* * *

[1208]

MR. ELLISTON: Just a second, Your Honor.

519 is the Plaintiffs' Answers to Interrogatories;

Plaintiffs' 520 is the work history and the materials list.

THE COURT: All right.

MR. ELLISTON: Defendants have previously objected to Plaintiff Marble's interrogatory answers and the work history and the product list, and we would reurge those objections and would incorporate and adopt those objections and that they been applied to the Plaintiffs' Answers to Interrogatories, work history and product list.

The Defendants would further incorporate their objections and trial brief that was filed on March 2nd, 1989, objections to the Plaintiffs' Answers to Interrogatories, product list and work hisitory list, as those are inadmissible hearsay.

The reason, Your Honor, that I would like to address 520 again is, subsequent to their admission yesterday, the lack of trustworthiness of 520 was further demonstrated by the following evidence: that the typed list was prepared in the Fall of 1986, which would be eight or nine months after the death of Mr. Marble in January of 1986. Mr. Marble himself did not compare or review the typed 520 that has been admitted into evidence with the written list that he had prepared. The written list, while difficult for anyone else to read, was discarded or

[1209]

destroyed without the Defendants having the opportunity to review it.

There are other witnesses available that could testify to these products, by the Plaintiffs' own admission, and the testimony. Mr. Marble's brother, who worked with him and worked as his supervisor, currently resides in Frankston, Texas. Exhibit No. 520 was not provided to the Defendants until December of 1987 and at that time was not sworn. Further, it was demonstrated in the testimony that certain information in Exhibit No. 520 was supplied by Mr. Houston, for instance, the corporate information at the top of certain pages, as was demonstrated by the Celotex page. Therefore, the Defendants would request that Exhibit No. 520 be stricken, as it is hearsay, and pursuant to Rule 403.

For purposes of the Court's record, I would like to offer Defendant's Exhibit No. 601, which is the letter dated December 7, 1987, forwarding the job and product list to Mr. Albert Marble. And that is offered for the Court's record purposes only.

Your Honor, Exhibit No. 519 presents a different question that I'd like to address, because 519 are the alleged interrogatory answers of Mr. and Mrs. Marble, and as objected to in the Defendants' March 2nd objection and trial brief, they are inadmissible hearsay and are

[1210]

self-serving hearsay and should be stricken.

First of all, they are not properly sworn. If Your Honor looks at the page where the Plaintiffs are supposed to swear to the truthfulness and accurateness of the interrogatory answers, there's no such provision. It's simply

stated that they are sworn and subscribed to by Mr. and Mrs. Marble. That's not a proper affidavit.

Secondly, certain of those questions and answers violate the motion in limine. For instance, there's a question about workers' compensation insurance, there's a question about prior lawsuits and claims, there's certain stock answers given to certain questions that are used in each of these cases and each set of answers to interrogatories.

Admittedly, they were put in final form by Mr. Houston's secretary, and Interrogatory No. 15, which questions: "Who provided information for answering those interrogatories," Mr. Marble is listed, Mrs. Marble is listed and Mr. Rex Houston is listed. Therefore, the interrogatory answers should be stricken, even if the work history sheet and product list is not stricken.

If the purpose of Exhibit No. 519—if the purpose of the interrogatory answers is to lay the foundation for Exhibit No. 520, the work history sheet, and products list, then 519 should not go to the jury.

* * *

[2397]

AFTERNOON SESSION

March 17, 1989 1:15 p.m.

THE COURT: Please be seated.

You may commence.

MR. TAYLOR: Thank you.

THE COURT: You wish to be called at 1:50?

MR. TAYLOR: Yes, Your Honor.

THE COURT: All right.

MR. TAYLOR: May it please the Court, Mr. Houston.

Folks, I know we've come to the end of a very long trial, and it may seem kind of funny to ask this question at the outset, but I really think that the first thing we need to look at is what's the issue in this case, because Mr. Houston and Mr. Sadler have done a fine job of proving to all of us something that is not in dispute, which is that asbestos is dangercus. We know that. We know that asbestos is dangerous. That's not the issue. And we tried to get across to everybody that that's not the issue from the very start of this trial.

There is no dispute that if you're exposed to enough asbestos, that can hurt you. It can cause asbestosis, it can cause lung cancer, it can cause

* * *

[2398]

mesothelioma. It can do all of the things that have been said.

But the thing that we have to remember is the quantity of asbestos that you're exposed to. Now, Mr. Houston said on jury argument, and it's true, asbestos was known to be dangerous in the 1930's. That's true, Dr. Weil testified to that. Now, unlike what Mr. Houston said, we asked him that on direct examination. You all remember that. We asked Dr. Weill, the man on the video tape: When was it first known that asbestos was dangerous?

And he said it was known in the 1930's. That's true. And I'm not going to suggest to you all that it's not true, because that's not fair.

All that we want, all of us, want you all to do is be reasonable and be fair in looking at the evidence and in rendering your verdict, and we know that you all are going to do that.

* * *

Supreme Court, U.S.
FILED
MAY 3 1991
OFFICE OF THE CLERK

(2)

NO. 90-1490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CELOTEX CORPORATION,
Petitioner,

v.

LLOYD D. KING, LOUAN KING, A. B. WILLIS, MOLLY WILLIS, CLETUS GRESHAM, LARRY JONES, BESS JONES, JOHNNY FOWLER and MARY MARBLE, Individually and as Representative for the Estate of ALBERT L. MARBLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Texas Constitution and the Texas common law provide sufficient due process safeguards for the imposition of a punitive damage award because:

   a. The assessment of punitive damages in the asbestos litigation relates to specific individual harm and Texas law has adopted specific standards for the imposition and review of the award;

   b. The Texas Constitution, common law and gross negligence provide specific criteria which fairly apprised Celotex that its conduct would subject it to punishment; and

   c. Texas courts have adopted traditional common law standards which were thoroughly applied to this award by the District Court and the Fifth Circuit Court of Appeals.

2. Whether an unambiguous, unequivocal admission of a disputed fact by counsel, adverse to the interest of the client, and the utilization of the same evidence by Celotex to prove its claim for contribution constitutes a judicial admission.

PARTIES TO THE PROCEEDING

PETITIONERS:

The Celotex Corporation
Carey Canada, Inc., wholly owned subsidiary
The Jim Walter Corporation, parent corporation

RESPONDENTS:

Lloyd D. King
Louan King
A. B. Willis
Molly Willis
Cletus Gresham
Larry Jones
Bess Jones
Johnny Fowler
Mary Marble

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NO. 90-1490

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THE CELOTEX CORPORATION,
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GROUNDS FOR JURISDICTION

The United States Court of Appeals entered an Order on July 12, 1990, affirming the decision of the district court. The United States Court of Appeals denied a

Petition for Rehearing on August 31, 1990. Petitioners attempted to file this Petition on February 19, 1991, but the Petition was rejected as non-timely by the Clerk of this Court. *See* Appendix A. Respondents contend that the Petition was not timely filed because it should have been filed on or before November 29, 1990, which was ninety days after the denial of rehearing. Rule 13.4 of the Rules of the Supreme Court and 28 U.S.C. § 2101(c). At the request of the Clerk, letter briefs of the parties have been submitted on this issue. (A copy of the letter brief filed by Respondent is attached as Appendix B.)

Jurisdiction in the District Court was based on 28 U.S.C. § 1332(a). Respondents contend that this Court does not have jurisdiction due to the failure of Petitioner to timely file its Petition. This Response to the Petition is filed pursuant to this Court's Order, but without waiving the previous objection.

STATUTES INVOLVED

This Petition involves the Due Process clause of the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

This appeal involves seven consolidated suits alleging personal injury and death resulting from exposure to asbestos contained in products manufactured and sold by the Petitioner. The basis of the underlying claims are strict liability/failure to warn and gross negligence. All other defendants except The Celotex Corporation settled prior to verdict. After a lengthy trial the jury rendered a verdict in favor of the Respondents awarding compensatory and punitive damages. After extensive post-

verdict motions, the District Court entered judgment based upon the jury verdict for the Respondents.

Respondents have no way of verifying Celotex' post-verdict assertions regarding the number of pending lawsuits or prior punitive and/or compensatory awards.

This appeal involves specific allegations of misconduct by this defendant as it relates to specific individuals. The jury properly awarded damages based solely upon the conduct of this defendant as it related to each individual. Celotex was not and has not been punished for the same course of conduct for all injured individuals.

During the trial one of the Respondents, Mary Marble, in compliance with the Standing Order for Asbestos Cases in the Eastern District of Texas, introduced a "product list" prepared by her husband prior to and with knowledge of his impending death. Celotex relied upon the "product list" to prove its claim for contribution against other manufacturers and unamibuously judicially admitted that Mr. Marble was exposed to asbestos from its products. Celotex *voluntarily* admitted this material fact although evidence existed in the record from a co-worker that Mr. Marble was not exposed to Celotex' products. The unequivocal and unambiguous statement made by counsel to the fact finder during trial is without question binding upon Celotex.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because it was not timely filed pursuant to Rule 13.4 of the Rules of the Supreme Court and 28 U.S.C. § 2101(c).

Furthermore, the Texas Constitution and Texas common law provide for due process guarantees in the assessment of punitive damages. The instructions of the District Court and post-verdict review by the District Court and Appellate Court exceed the standards approved by this Court in *Pacific Mutual Life Insurance Company v. Haslip*, 111 S.Ct. 1032 (1991).

In addition, the Fifth Circuit Court of Appeals properly held that statements made by counsel constitute a judicial admission. No conflict exists between the Opinion of the Fifth Circuit and authorities cited by the Petitioner, because the facts are clearly distinguishable.

I. THE TEXAS CONSTITUTION AND TEXAS COMMON LAW HAVE ESTABLISHED A PLAINTIFF'S RIGHT TO RECOVER PUNITIVE DAMAGES AND PROVIDE SUFFICIENT DUE PROCESS SAFEGUARDS FOR THE IMPOSITION OF A PUNITIVE DAMAGE AWARD.

The Texas Constitution clearly provides and establishes the right to recover punitive damages. Article 16, Section 26 provides:

> Every person, corporation, or company that may commit a homicide, through a willful act or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be . . .

TEX. CONST., art. 16, § 26.

In product liability and gross negligence actions, Texas Courts and the United States Court of Appeals for the Fifth Circuit construing Texas law have repeatedly held

that a plaintiff is entitled to recover exemplary damages where the acts of a defendant demonstrate that it was consciously indifferent to the plaintiff's welfare and safety. *Burk Royalty v. Walls*, 616 S.W.2d 911 (Tex. 1981); *Rawlings Sporting Goods Co., Inc. v. Daniels*, 619 S.W. 2d 435 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.); *Heil Co. v. Grant*, 534 S.W.2d 916, 926 (Tex. Civ. App. —Tyler 1976, writ ref'd n.r.e.); *Aguirre v. Armstrong World Industries, Inc.*, 901 F.2d 1256 (5th Cir. 1990); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1985); *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371 (5th Cir. 1982), *appeal after remand*, 722 F.2d 1238 (5th Cir. 1984), *modified, rehearing denied*, 727 F.2d 350.

Moreover, the Fifth Circuit, construing Texas law, in considering the same challenge of multiplicity of punitive damage awards in asbestos litigation has held:

> . . . Texas law does not preclude, but, in fact, apparently grants the right to punitive damages awarded in favor of product liability plaintiffs, even in context of mass asbestos litigation with potential for multiple punitive damage awards against a defendant.

Hansen, 734 F.2d at 1036.

Texas common law has embraced the traditional common law approach for assessment of punitive damages. As this Court stated in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1990):

> Under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful con-

> duct. The jury's determination is then reviewed by the trial and appellate courts to ensure that it is reasonable . . .
>
> . . . Since every state and federal court considering the question has ruled that the common law method for assessing punitive damages does not in itself violate due process, it cannot be said that that method is so inherently unfair as to be per se unconstitutional. The method was well-established before the Fourteenth Amendment was enacted, and nothing in the Amendment's text or history indicates an intention to overturn it.

Id., at 1042, 1043.

A complete review of this record demonstrates that the jury was given: (1) clear objective criteria for the imposition of punitive damages; (2) the full panoply of procedural protections; (3) instructions describing the purpose of punitive damages as punishment and deterrence; (4) the instructions required the jury to consider the character and degree of the particular wrong and that the award was not compulsory; (5) the trial court conducted a full post-trial review utilizing established standards to ensure a meaningful and adequate review including the Petitioner's claim of multiple prior punitive damage awards; (6) the appellate court conducted a complete review of the evidence supporting the imposition of punitive damages and whether or not the amount of the award was reasonable utilizing established common law standards. Every possible due process safeguard and protection was afforded this Petitioner.

Texas common law has established certain well-recognized rules for the imposition of punitive damages. First, a plaintiff may not recover punitive damages in the

absence of a specific finding of actual damages. *Nabours v. Longview Savings & Loan Association,* 700 S.W. 2d 901 (Tex. 1985). Second, punitive damages awarded must bear a reasonable proportion to actual damages. *Alamo National Bank v. Kraus,* 616 S.W.2d 908 (Tex. 1981). Third, the trial court and appellate court must review the award of the jury for excessiveness. In making that review, the trial court and the appellate court *must* consider at least the following factors: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and, (5) the extent to which the defendants' conduct offends the public's sense of justice and propriety. *Id.,* at 910. In addition, this trial court specifically reviewed by post-trial motions and affidavits the history of punitive awards as provided by this defendant. (Plaintiffs have no way to verify the accuracy of the defendant's statements post-trial.) A comparison of these Texas standards with the standards in *Pacific Mutual Life Insurance Co. v. Haslip,* 111 S.Ct. 1032, clearly demonstrates that the Texas common law scheme affords sufficient due process protections.

A. Assessment Of Punitive Damages In Asbestos Litigation Relating To Specific Individual Harm Does Not Violate Due Process.

Asbestos litigation began with a single plaintiff seeking recovery for his injuries in the case of *Borel v. Fibreboard Paper Products Corp.,* 493 F.2d 1076 (5th Cir. 1973), *cert. denied,* 419 U.S. 869. The full extent of the death and disease caused by the manufacturers of products containing asbestos such as this Petitioner was not known

at that time by the plaintiff and has still not been fully realized. Only the Petitioner knew the extent of the exposure throughout this country and the thousands it voluntarily and knowingly exposed to asbestos.

This punitive damage award and every punitive damage award has been specifically related to an individual plaintiff. No recovery was ever made on behalf of all that are harmed nor could such an award be assigned. The exposure of individuals occurred over decades. The degree of harm varies from individual to individual from minor disability to death. It is only through the assessment of individual harm and punishment for that individual harm that punitive damages may be awarded. This litigation is unlike most "mass torts", which involve a single catastrophe. This litigation involves individual exposure to individual products by thousands of men and women over decades.

Celotex urges that it is not this particular award that is objectionable but, rather, the combination of past awards and the potential of future awards that violates due process. Thus, it argues, having one punitive damage award against it for one individual, all future plaintiffs' rights should be foreclosed. Such a holding by this Court, on this record, would arbitrarily discriminate between plaintiffs in product liability actions. In essence, such a holding would limit an award for punitive damages to the first plaintiff able to win the race to the courthouse and secure an award, or prohibit punitive damage claims after Celotex selected the award it wanted to pay. Clearly, had one plaintiff sought to recover for all future plaintiffs, Celotex would object that it violated the very Texas standards it complains about in this Petition.

Not only does Celotex' view of due process violate both due process and equal protection principles, it would completely defeat the purpose of punitive damages, which is to punish the wrongdoer and deter further wrongdoing. For example, if an early award of punitive damages, based on an individual's injury, as in these cases, was in the amount of $500, Celotex could voluntarily pay the award and destroy the very purpose of punitive damages. No longer would there be incentive to rectify the harm of defective products through recall, repair or warning. Nor should this Court arbitrarily decide for future "mass torts" at what level punishment is sufficient without any knowledge of the nature of the wrong, the degree of culpability of the parties, the character of the conduct, and the extent to which the defendant's conduct offends the public sense of justice and propriety. Celotex argues that the potential for multiplicity of punitive damage awards should foreclose the right of those injured to recover punitive damages. In essense, its argument is that it injured and caused death in so many people that it should not be punished. A holding by this Court that a manufacturer who causes death in thousands of people is not subject to punitive damages simply because of the magnitude of the harm, completely destroys the policy of deterrence.

Celotex claims that the purpose of punitive damages is negated because its potential liability *may* exceed its ability to pay and that it has now sought protection by voluntarily seeking bankruptcy. Simply because the amount of damages sustained by plaintiffs wrongfully injured *may* exceed the ability of the defendant to pay has never justified *elimination* of the right of recovery or the basis of recovery. No individual or corporation has

the right to protection simply because its conduct was so reprehensible that it consciously and intentionally caused death and disease in 65,000 people. The conduct of Celotex consists of multiple acts over several decades against thousands of individuals. The amount of damages awarded *in this action* is specifically related to the amount of individual damage by each plaintiff.

The simple fact is that Celotex could have introduced evidence of prior awards paid in punitive damages for the jury's consideration and urge that it had been sufficiently punished. Instead, it chose not to tell the jury of any previous punitive award payment and then complained upon appeal that the award of this jury was unjust because of prior awards.

Celotex by affidavit, post-trial, demonstrated only that two prior punitive damage awards had been paid in a 1981 case and a 1984 case for a total of $175,000. This type of evidence has been rejected by the Second Circuit as failing to make an adequate record in the trial court to support a due process challenge. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2nd Cir. 1990), *cert. dismissed,* 111 S.Ct. 27, 111 L.Ed.2d 840; *Johnson v. The Celotex Corporation,* 899 F.2d 1281 (2nd Cir. 1990), *cert. denied,* 111 S.Ct. 297, 112 L.Ed. 2d 250; *Racich v. Celotex Corp.*, 887 F.2d 393 (2nd Cir. 1989).

In *Johnson v. The Celotex Corporation,* 111 S.Ct. 297, Celotex and another manufacturer, Owens-Illinois, appealed an adverse judgment presenting this precise argument. Celotex offered no evidence of the amount of punitive damages paid. However, Owens-Illinois advised the Court it had paid $554,194 in punitive damages,

which is in excess of three times the amount Celotex now claims it has paid. The Second Circuit—in an Opinion that this Court, after reviewing, refused Certiorari—wrote, "there has been insufficient proof to demonstrate an *unjust result* of multiple imposition of punitive damages for the same course of conduct." *Id.*, at 1287. The Court continues, stating, "The record here simply is insufficient to permit an examination of the claim that there is a multiple award of punitive damages offensive to the fundamental fairness inherent in due process." *Id.*, at 1287. 1288. Such is the scenario now before this Court. The Petitioner, Celotex, has simply failed to maintain and present an adequate record that will support its due process arguments.

B. The Texas Constitution, Common Law And Gross Negligence Provide Specific Criteria Which Fairly Apprised Celotex That Its Conduct Would Subject It To Punishment And Does Not Violate Due Process.

Celotex, incredibly, argues that Texas law did not apprise or warn it that if it caused death by a willful act or omission it would be responsible for punitive damages. As previously demonstrated, the Texas Constitution clearly provides for exemplary damages under these facts. Additionally, the previous Constitution of 1869 in Texas included a similar provision making every person or corporation that might commit a homicide through a willful act or omission responsible in exemplary damages. This constitutional provision was in effect in Texas approximately 50 years before Celotex first manufactured and sold its products.

In spite of the constitutional provision, Celotex urges that it was not warned because product liability law was not adopted in Texas until 1967. Celotex' argument ignores the basis of the punitive award—gross negligence and the Texas Constitution. It is the Texas Constitution and the grossly negligent conduct of Celotex that is the basis of the punitive damage award. The right of action of gross negligence existed in common law and Texas law long before Celotex engaged in this conduct.

Celotex complains that the Trial Court's instructions fail to define the conduct. However, a review of the instructions demonstrates a clear definition of the objectionable conduct and adequate standards for the imposition of punitive damages. The Court instructed the jury, as follows:

> The plaintiffs claim that the acts (previously defined) of each of the defendants was done *willfully, intentionally,* or *with a callous or reckless* disregard and indifference to the rights and welfare of the plaintiffs, and that such conduct entitles them to an award of punitive damages *in addition* to the compensatory damages.
>
> I instruct you, that under the laws of Texas, a heedless and reckless disregard means more than a momentary thoughtlessness, inadvertence or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare or safety of the persons affected by it. In their claim for punitive damages, the plaintiffs claim, generally, that the defendants acting individually, or in conjunction with or in conspiracy with other asbestos manufacturing companies, *willfully, intentionally,* or with *reckless indifference, withheld from*

> *the plaintiffs* as well as from the public in general, *information* as to the dangers and potentially deadly nature of asbestos products, long after each of the defendants had *actual knowledge* of the dangers connected with the use of its products.
>
> The plaintiffs also contend that this action on the part of the defendant, either individually or collectively, continued for many years and was *knowingly* designed by each of the defendants to cause the plaintiffs and their household members and other similarly situated workers to remain ignorant of the nature of their asbestos products.
>
> If you find for the plaintiffs, and if you further find that any of the defendants did act with *malice, willfulness, intentionally* or with a *heedless and reckless* disregard or indifference to the rights of others, the law would allow you, *in your discretion,* to assess punitive damages against the defendant as *punishment and as a deterrent to others.*
>
> In making your determination as to punitive damages, you will *consider the totality of the circumstances* and that you *may consider the financial resources of the defendant in fixing the amount of such damages.*

(Tr. Vol. X, pp. 2488-2491), emphasis added.

Clearly, these instructions go far beyond those given in *Pacific Mutual Life Ins. Co. v. Haslip,* 111 S.Ct. 1032. The instructions specifically state objective criteria for the imposition of punitive damages, specifically outline the conduct which supports the award, specifically state that any award is discretionary, specifically instructs the jury to consider the totality of the circumstances, specifically state that the purpose of punitive damages is punish-

ment and deterrence, and finally, in accordance with Texas law, allows the jury to consider the financial resources of the defendant in fixing the amount. Clearly, these instructions satisfy the due process requirements.

C. The District Court's Award Of Punitive Damages Was Governed By Sufficient Guidelines And Does Not Violate Due Process.

Contrary to the assertions of Celotex, Texas common law, as previously demonstrated, provided for *fundamental fairness and safeguards* in the award of punitive damages. As previously demonstrated, the jury was fully and fairly instructed concerning gross negligence and the imposition of punitive damages. The trial court and appellate court completely reviewed the underlying evidence and the amount of the award utilizing traditional common law standards. Additionally, both the trial court and the appellate court reviewed Celotex' claim that previous punitive awards should prohibit the imposition of this award.

Clearly, the lower courts recognized that the recovery of punitive damages is an individual right and that these awards were awarded based upon specific individual harm. Celotex chose to present evidence of prior awards in post-verdict motions. The sole evidence was by affidavit, after verdict, without any discovery, cross-examination or investigation concerning the truth of these assertions. The lower courts, after reviewing all of the evidence and instructions upheld the jury verdict. All of the safeguards of due process and Texas law have been afforded this defendant.

II. CELOTEX JUDICIALLY ADMITTED EXPOSURE BY ALBERT MARBLE TO ITS PRODUCTS AND COMPETENT EVIDENCE OF EXPOSURE EXISTS IN THE RECORD.

The "product list" prepared by Albert Marble pursuant to the Standing Order in Asbestos Cases in the Eastern District of Texas was properly admitted into evidence pursuant to FED. R. EVID. 1006, FED. R. EVID. 804(b)(2) or FED. R. EVID. 804(b)(5).

By order dated July 7, 1982, the Federal Courts in the Eastern District of Texas require in all cases that claim damages as a result of exposure to products containing asbestos that a plaintiff furnish by answer to interrogatory each asbestos product he was exposed to, including the identity of the manufacturer, the identity of the particular product at each place of employment, and to state, in detail, when and where he was exposed to each product. There are 25 potential manufacturers and hundreds of products for which he is required to provide this information. The product list is always admitted into evidence for the purpose of proving exposure. The product list is admissible pursuant to *Moore v. Johns-Manville Sales Corp.*, 781 F.2d 1061 (5th Cir. 1986) and FED. R. EVID. 1006.

Mr. Marble worked in the insulation business for numerous contractors throughout his career. His employment required him to travel "wherever the job was." (Tr. V, p. 1130) He lived in many states, including Mississippi, Florida, Georgia, Alabama, North Dakota, Utah, Nevada, New Mexico, Texas and many others. (Tr. V, p. 1130) He worked on more than 80 different job sites throughout the country. (Tr. V, pp. 1145-1146)

Mr. Marble was diagnosed in 1985 with malignant mesothelioma. Prior to his death, he answered the interrogatories of the defendants under oath and in compliance with the Court's standing order. In the fall of 1985, he and Mrs. Marble began compiling his work history and product list in response to the request of this defendant and 24 other asbestos manufacturers. Mr. Marble began compiling the information *after being told of his condition and with full knowledge of his impending death. He actually made the list himself.* When he became too tired or weak to write the information down, Mrs. Marble would write it down for him. (Tr. V, pp. 1144-1145)

Mr. Marble completed the list before his death in January, 1986. (Tr. V, p. 1145) Mrs. Marble testified that the list was *his list; his product;* and that *he was preparing it for this lawsuit,* as required by the defendants and the Court Order. (Tr. V, p. 1146) She also testified that at the time he was preparing the list, he knew his death was imminent.

Mrs. Marble testified that she asked her daughter, Julie, to type the list so that it would be in more legible form. After the list was typed, Mrs. Marble and Julie compared the two lists to ensure accuracy. (Tr. V, p. 1145) Unfortunately, when Mrs. Marble submitted the typed list, she threw away the handwritten list. (Tr. V, p. 1193) It is the typed list with this explanation which was admitted into evidence for the jury's consideration.

The product list of a plaintiff is, without question, the single most complete and probative piece of evidence available concerning a plaintiff's work history and product use. It is generally prepared by the plaintiff in his own handwriting and then typed so that it will be in a legible form for the jury.

A. Celotex Did Judicially Admit Exposure.

Celotex fails to state in its Petition that plaintiffs offered two forms of evidence to show the asbestos products to which Albert Marble was exposed: the deposition testimony of a co-worker, Joseph William Cameron (Tr. V, pp. 1064-1071), and a "product list" prepared by Mr. and Mrs. Marble pursuant to Court Order dated July 7, 1982 of the Federal Courts in the Eastern District of Texas.

Interestingly, Celotex does not inform this Court that Mr. Cameron, a co-worker, was specifically asked if Mr. Marble was exposed to products manufactured by Celotex or Philip Carey. Mr. Cameron testified that he had first met Mr. Marble in 1943 (Tr. V, p. 1066) and that he worked on numerous jobs with Mr. Marble and named some of them (Tr. V, p. 1060). In response to a question concerning exposure of Mr. Marble to specific manufacturers' products, *Mr. Cameron denied that Mr. Marble used products manufactured by Celotex/Philip Carey.*

Celotex never made reference to this testimony concerning exposure to its products. It never asked the jury to consider this sworn testimony of a long-time co-worker concerning whether or not Mr. Marble was exposed to its products. Celotex never suggested this testimony was more credible, trustworthy or believable than the product list prepared by Mr. Marble pursuant to Court Order. Celotex never suggested that Mr. Marble fabricated the list or that the list should not be relied upon by the jury in answering either the exposure or contribution issues.

Instead, Celotex, at a crucial stage of trial, before the "fact finder" candidly admitted:

> Question 2 is were they exposed to our products? And, of course, the answer to that one was "Yes," and I agree with that. (Tr. X, p. 2400)

Celotex went further and relied upon the very same product list to prove contribution against other manufacturers. The burden of allocating causation rested with Celotex, not the plaintiffs. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984). On the issue that Celotex had the burden of proof, it did not rely on the deposition of the long-time co-worker but, rather, implored the jury to rely on the product list of Mr. Marble.

> We would like you to look at the job list and product list of each one of these plaintiffs, to *determine whether or not they were exposed.*
>
> You will be asked to determine a *percentage of responsibility to the various defendants,* and I would ask that you count those up and take a look at all the different jobs these people have worked with these products on . . . that at least they should be held at least 10 percent liable or have 10 percent responsibility assessed to each and every one of them. And *Celotex* should have no more than 10 percent assessed in our judgment.

(Tr. X, p. 2448).

The jury did just what Celotex told it to do. In the case of Mr. Marble, instead of following the co-worker's testimony, it found eleven other manufacturers' products that he was exposed to and assigned a percentage finding against ten of them.

The fact is, that Celotex admitted before the jury, in open Court, during trial that Mr. Marble was exposed to its products. Additionally, Celotex utilized the product

list as a specific mode of evidencing exposure to other manufacturers' products for its claim for contribution. Both actions constitute judicial admissions by Celotex of the fact that Mr. Marble was exposed to its products.

Wright and Graham address judicial admissions and quote Wigmore for the definition:

> A requirement for evidence ceases to apply where the opponent, by *express statement* made *for the purpose of trial,* has
>
> 1) Conceded the truth of a fact; *or*
>
> 2) Assented to a specific mode of evidencing it.

22 C. WRIGHT, K. GRAHAM, FEDERAL JUSTICE AND PROCEDURE § 5194 (1978) (footnote omitted). The conduct of Celotex' counsel during trial meets both of these definitions. There is no dispute in the law that an unambiguous admission by counsel in the course of trial is binding on its client. *Oscanyan v. Arms Co.,* 103 U.S. 261, 26 L.Ed. 539 (1880). Contrary to the assertions of Celotex, there is no conflict between this decision and decisions of other circuits. As will be demonstrated, the opinions relied upon by Celotex to "create" a conflict are clearly distinguishable from this case.

Celotex urges that its counsel, during jury argument, did not make a judicial admission but, rather, was simply arguing *the record as it existed at the time of submission.* The assertion by Celotex is far from the truth. The record contained affirmative proof by a co-worker that Mr. Marble was not exposed to Celotex products. The record, additionally, contained all of the circumstances surrounding the making of the product list and the facts concerning how the original handwritten list was destroyed.

Instead of arguing that record and testimony, Celotex made the conscious and voluntary decision *to admit exposure to its products.* Furthermore, it relied on the trustworthiness and accuracy of the product list to prove contribution and made no attempt to elicit any other testimony from co-workers concerning contribution. It assented to, acquiesced in, relied upon and benefitted from the product list.

Celotex argues *Clark v. City of Los Angeles,* 650 F.2d 1033 (9th Cir. 1981), *cert. denied,* 456 U.S. 927 (1982), as authority for its position. *Clark* is not authority and does not address the issue before this Court. The issue in *Clark* was whether or not *reference* to a piece of evidence in argument constitutes *waiver* of the original objection. That issue is far different from admitting a *fact* required to be proved. The controversy in *Clark* centered around the admission of a diary written by one of the plaintiffs who began taking notes at the suggestion of a lawyer. The diary chronicled *discussions* with the police, other vendors and city officials, and describes the plaintiff's and other vendors' *feelings* about these encounters. It also contained *non-expert opinion* which was not admissible. It was described by the Court as a *"highly emotive document that does not simply relate factual occurrences,* but is written in a style designed to *arouse sympathy and create enmity for the appellants."* *Id.,* at 1038.

In closing argument, the attorney for the defendant *did not admit an underlying fact to be proved* as Celotex did but, rather, attacked the diary as not being *reliable. Id.,* at 1038-1039. The reference to the diary by counsel for the defendants involved "what the diary did not contain, i.e., lists of merchandise sold or records of

monies collected, the absence of which would tend to show that the *diary was not reliable." Id.,* at 1039.

Plaintiffs, here, admit that Celotex could have challenged the reliability of the product list in argument without waiving its objection. Celotex could have referred to the product list and how it was made without admitting exposure. But, instead, Celotex *admitted exposure and never questioned the reliability of the list before the jury.* Celotex could have chosen to say nothing about Question 2, and would not have admitted exposure. *It could have relied upon the deposition testimony of Mr. Cameron and denied exposure.* But, it didn't. *It chose,* voluntarily, to admit exposure.

Celotex also improperly cites *Hardy v. Johns-Manville Sales Corp.,* 851 F.2d 742 (5th Cir. 1988), for authority. *Hardy* dealt with the question of whether statements made in *appellate briefs* submitted by a party in *one action* may be used against that party in a *different action* between *different parties* deciding *different issues.* This Court properly held under those circumstances the statements contained in *appellate briefs* were not judicial admissions.

In *Hardy,* a product liability action seeking damages, the plaintiffs introduced statements made in appellate briefs by Raymark and Keene in a *different lawsuit* filed in Illinois for declaratory judgment seeking to establish that their *insurance coverage existed.* The prior lawsuits involved interpretation of a contract of insurance by Raymark and Keene and their respective insurers, in "neither of the suits were any of the *Hardy* plaintiffs parties, nor did the suits specifically concern the claims, circumstances, exposures, or injuries of the plaintiffs."

Id., at 745. This Court properly distinguished actual allegations in trial court pleadings and arguments made in appellate briefs.

This appeal does not involve statements made in appellate briefs in a different proceeding with different parties and different issues. Nor does this appeal involve a dispute as to what the trial court record shows. This appeal involves the unequivocal statement, contrary to the interest of Celotex, made by Counsel for Celotex during the same trial about a fact to be proved by the plaintiffs. No danger of confusion existed before the jury. In fact, the admission by Celotex clarified the positions of the parties concerning a material fact which could have been in dispute for the jury to determine. Counsel for Celotex was not attempting to argue the trial record but, rather, admitted the exposure of Mr. Marble.

In *Childs v. Franco,* 563 F.Supp. 290 (E.D. Pa. 1983) a United States District Court held defense counsel's statements made during closing argument constituted a judicial admission. Citing *Glick v. White Motor Company,* 458 F.2d 1287, 1291 (3rd Cir. 1972) and other cases, the Court held:

> If unequivocal, an admission of counsel during the course of trial is binding on the client.

Childs, 563 F.Supp. at 292. The Court found the admission by defense counsel related to a question of fact. The statement made was unambiguous. Similarly, it is difficult to imagine how statements made by counsel for Celotex can be any more clear or unambiguous:

> Question 2 is were they exposed to our products? *And, of course,* the answer to that one was "Yes," *and I agree with that.*

(Tr. Vol. X, p. 2400). Clearly, Celotex admitted a material fact during trial and is bound by the judicial admission.

CONCLUSION

The Texas Constitution and Texas common law clearly grant a plaintiff the right to recover punitive damages. Furthermore, Texas common law has adopted the common law method of assessing punitive damages. The jury was properly instructed concerning punitive damages and the trial court and United States Court of Appeals for the Fifth Circuit carefully reviewed the jury award pursuant to those established standards. All due process guarantees and safeguards have been given to this defendant.

Celotex clearly and unambiguously judicially admitted an underlying fact to be proved before the fact finder during trial. Celotex voluntarily chose to admit the fact and utilized the product list to prove its claim for contribution. It voluntarily chose to ignore contrary proof in the record. Additionally, the product list was competent evidence proving exposure and was made pursuant to the Standing Order in the Eastern District of Texas.

Plaintiffs respectfully request that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

February 25, 1991

Mr. Robert Hayden Burns
Butler & Binion
1600 First Interstate Bank Plaza
Houston, TX 77002-5008

RE: *Celotex Corporation v. Lloyd D. King, et al.*

Dear Mr. Burns:

Your petition for a writ of certiorari in the above-entitled case, mailed from Houston on February 11, 1991 was received February 19, 1991 and must be returned as out of time.

Inasmuch as the Court of Appeals for the Fifth Circuit denied a petition for rehearing on August 31, 1990, it would appear that the time to file a petition in this Court expired November 29, 1990 which was ninety days after the denial of rehearing. See Rule 13.4 of the Rules of the Supreme Court and 28 U.S.C. § 2101(c). This office is unaware of any provision in Title 11 of the United States Code that would operate to suspend 28 U.S.C. § 2101(c) with respect to the timely filing of a petition for a writ of certiorari in a civil matter by a debtor. Section 3 of Judge Baynes order of January 10, 1991 has been noted, but it is unclear how such order can be squared with 28 U.S.C. § 2101(c).

Accordingly, your petition and check in the amount of $300.00 must be returned pursuant to Rule 13.3 of the enclosed Rules of the Court.

Very truly yours,

WILLIAM K. SUTER, Clerk

by
Francis J. Lorson
Chief Deputy Clerk

Enc.

cc: Paul L. Sadler
Clerk, United States Court of Appeals
for the Fifth Circuit (Your No. 89-2640)
Clerk, Bankruptcy Court of the United States
District Court for the Middle District of
Florida (Your No. 90-10016-8B1)

APPENDIX B

WELLBORN, HOUSTON, ADKISON, MANN,
SADLER & HILL
ATTORNEYS AT LAW
HENDERSON, TEXAS 75653-1109

March 13, 1991

Mr. William K. Suter, Clerk
Supreme Court of the United States
One First Street Northeast
Washington, D.C. 20543

Attn: Francis J. Lorson, Chief Deputy Clerk
Re: The Celotex Corporation v. Lloyd D. King, et al
Dear Mr. Suter:

This letter is being sent in response to the letter dated March 8, 1991, which was directed to you by Mr. Robert Burns, counsel of record for the Celotex Corporation.

The Celotex Corporation maintains that 11 U.S.C. § 108(c) extends the mandatory appellate timetables for filing a petition for writ of certiorari contained in 28 U.S.C. § 2101(c). There is no controlling case law nor authority which holds or even suggests that 11 U.S.C. § 108(c) is to be construed in such a manner. The Celotex Corporation is, quite literally, asking you to formulate new law with regard to the construction of 11 U.S.C. § 108(c).

Subsection (c) extends, in particular, various statutes of limitation *for the benefit of creditors. See* 11 U.S.C. § 108 (bound edition) "Historical and Revision Notes"; *see also, In Re: Davidson,* 120 B.R. 777 (Bankr. N.J. 1990) and *Bain v. Bain,* 64 B.R. 581 (W.D. Va., Roanoke Div. 1986), and J. Patchan, Federal Rules of Bankruptcy, Part IV, The Debtor: Duties and Benefits—Rule 4006 "Notice of No Discharge," 1983 Advisory Committee's Notes (1989).

The tolling power of Section 108(c) inures to the benefit of the creditors of the bankrupt debtor. *See* 11 U.S.C. § 108, Notes of Decisions, Note 8. This premise is emphasized in *Morton v. National Bank of New York City*, 866 F.2d 561 (2d Cir. 1989), where the Court stated:

> "Recognizing that a petition in bankruptcy could sometimes give a debtor unfair advantage over a claimant by allowing the debtor to remain under the protection of the automatic stay until the limitation period governing the claimant's action had expired . . . Congress acted to solidly preserve the rights of a party 'stayed from commencing or continuing an action against the debtor because of the bankruptcy case.' "

Id. at 566.

This was the type of inequity Congress was seeking to remedy when it enacted Section 108(c). *See* 2 Collier on Bankruptcy ¶ 108.04 (L. King 15th ed. 1988); *see also*, Pub. L. 98-353, U.S. Code Cong. and Adm. News 1984, p. 576 and Pub. L. 99-554, U.S. Code Cong. and Adm. News 1984, p. 5227, and U.S. Code Cong. and Adm. News 1978, p. 5787.

In Re: APC Construction, Inc., et al v. Hinesburg Sand and Gravel, Inc., et al, 112 B.R. 89 (Bankr. D. Vt. 1990), also stands for the proposition that Section 108(c) extends any applicable non-bankruptcy law for the benefit of the creditors and re-emphasizes that this was the purpose of Congress in enacting this section. The aforementioned cause contains numerous legislative history references which reinforce this interpretation. *See also, In Re: Hunters Run, Limited Partnership*, 875 F.2d 1425, 1429 (9th Cir. 1989) and *Hazen First State Bank v. Speight*, 888 F.2d 547, 577 (8th Cir. 1989).

Section 108(c) of Title 11 does not and was never meant to alter the appellate timetables for appeals directed to the Supreme Court of the United States. The language contained in 28 U.S.C. § 2101(c) is mandatory and states that any writ of certiorari *shall* be taken or applied for within 90 days after the denial of the re-hearing (in this particular case). This statutory axiom is emphasized in *Missouri, et al v. Jenkins*, 110 S.Ct. 1651 (1990) where the Supreme Court stated that "[t]his 90-day limit is mandatory and jurisdictional." *Id.* at 110 S.Ct. 1660. The language of 28 U.S.C. § 2101(c) is clear and unequivocal—only a Justice of the Supreme Court may extend the time for applying for a writ of certiorari. This is the procedural avenue Celotex should have pursued if it desired to preserve any rights of appeal.

In summation, the Celotex Corporation is asking your office to interpret 11 U.S.C. § 108(c) in a manner in which it has heretofore never been interpreted. If your office accepted and filed Celotex's petition for writ of certiorari, Section 108(c) would—for the first time—operate in favor of the bankrupt debtor to suspend a statutory timetable for appeal to the Supreme Court of the United States.

With all due respect to the office of the Clerk of the Supreme Court of the United States, we ask you to refrain from acting in a judicial and/or legislative capacity and to reject Celotex's petition for writ of certiorari as untimely.

Yours very truly,

/s/ REX HOUSTON
For the Firm

RH/j

cc: Robert Hayden Burns

Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

(3)

No. 90-1490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CELOTEX CORPORATION,
Petitioner,
v.

LLOYD D. KING, LOUAN KING, A. B. WILLIS, MOLLY WILLIS, CLETUS GRESHAM, LARRY JONES, BESS JONES, JOHNNY FOWLER, AND MARY MARBLE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ALBERT L. MARBLE,
Respondents.

REPLY BRIEF OF PETITIONER THE CELOTEX CORPORATION

Robert Hayden Burns
Kevin F. Risley
Thomas W. Taylor
BUTLER & BINION
1600 First Interstate Bank Plaza
1000 Louisiana Street
Houston, Texas 77002
(713) 237-3293

ATTORNEYS FOR PETITIONER

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No. 90-1490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CELOTEX CORPORATION,
Petitioners,
v.

LLOYD D. KING, LOUAN KING, A. B. WILLIS,
MOLLY WILLIS, CLETUS GRESHAM, LARRY JONES,
BESS JONES, JOHNNY FOWLER,
AND MARY MARBLE, INDIVIDUALLY
AND AS REPRESENTATIVE OF
THE ESTATE OF ALBERT L. MARBLE,
Respondents.

REPLY BRIEF OF PETITIONER THE CELOTEX CORPORATION

TO THE SUPREME COURT OF THE UNITED STATES:

Since the time that Petitioner The Celotex Corporation ("Celotex") filed its Petition for Writ of Certiorari in this matter, this Court has issued its opinion in *Pacific Mutual Insurance*

Company v. Haslip, 499 U.S. _____, 59 U.S.L.W. 4157 (March 4, 1991). *Haslip* is a clear recognition by this Court that due process imposes limits upon a jury's discretion to award punitive damages. Although the court below realized that "a strong arguable basis exists for applying the due process clause of the United States and Texas Constitutions to a jury's award of punitive damages in a mass tort context," App. A-18-19, the court affirmed the award of punitive damages against Celotex with "misgivings." App. A-24.[1] *Haslip* has now established the analytical framework within which the due process claims of Celotex can be examined. For the reasons set forth below, *Haslip* requires that the award of punitive damages against Celotex be vacated. Alternatively, the cause should be remanded to the Fifth Circuit for further proceedings in light of the *Haslip* decision.[2]

TEXAS LAW ON PUNITIVE DAMAGES DOES NOT SATISFY THE STANDARDS RECOGNIZED IN HASLIP

Most of Respondents' Brief in Opposition is occupied in attempting to clothe the Texas system of punitive damages with the constitutional imprimatur granted the Alabama system in *Haslip*. Despite their best attempts, Respondents' efforts must fail. A careful review of what transpired below establishes that most of the critical safeguards which exist under Alabama law were not available to Celotex under Texas law.

The *Haslip* decision placed significant emphasis on the comprehensive scheme of appellate review of punitive awards

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1 The court below felt that it was bound by the en banc decisions of the Fifth Circuit in *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (1985) and 781 F.2d 394 (1986). In fact, neither of the *Jackson* decisions addressed a due process challenge to multiple punitive damages awards. Even if they had, those decisions are not binding on this Court, and their authority is dubious in light of the *Haslip* decision.

2 Since *Haslip*, this Court has granted certiorari in several cases involving challenges to punitive damage awards and remanded those cases for further proceedings in light of *Haslip*. *See, e.g., Inter Continental Life Ins. Co. v. Lindblom*, No. 90-1284 (April 15, 1991).

undertaken by the Alabama Supreme Court. After conducting a comparative analysis, the punitive award is reviewed in light of seven objective criteria established by prior decisions of the Alabama Supreme Court. The application of these factors "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages" because those objective factors "provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." [3] 59 U.S.L.W. at 4162. The *Haslip* opinion relied on the use of these factors to distinguish the Alabama system from Vermont and Mississippi law which allow punitive awards to be set aside only if they are "manifestly and grossly excessive" or the result of "passion, bias and prejudice." 59 U.S.L.W. at 4162 n. 10.

Texas law does not provide any comparable safeguards. Although Respondents suggest that *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981), has set forth five factors a Texas appellate court is to consider in reviewing punitive awards,[4] both the Texas Supreme Court and the Fifth Circuit have realized that the vague and lofty language offered by *Kraus* is meaningless and the protection *Kraus* purports to offer is illusory, resulting in a system with no greater objective standards than those utilized by Vermont and Mississippi. Long after *Kraus*, the Texas Supreme Court recognized that the requirement of a reasonable relationship between actual and punitive damages "is merely a tool to aid the courts in determining when an exemplary damage award is the product of 'passion rather than reason.'"

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3 Alabama law also requires the trial court to scrutinize a punitive award in light of these factors and "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of damages." *Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986). Texas law imposes no such requirement on Texas trial courts.

4 Two of the factors enunciated in *Kraus* are the "situation and sensibilities of the parties" and "the extent to which the defendant's conduct offends the public sense of justice and propriety." 616 S.W.2d at 910. These are a far cry from the objective criteria mandated by the Due Process Clause.

Wright v. Gifford-Hill & Co., Inc., 725 S.W.2d 712, 714 (1987), quoting *Tynberg v. Cohen*, 13 S.W.2d 315, 316 (Tex. 1890). In *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1046 (5th Cir. 1984), the Fifth Circuit stated that its authority to reduce excessive jury awards was limited to those awards that were so large as to "shock the judicial conscience" or that were so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive." *See also Capital Title Co., Inc. v. Donaldson*, 739 S.W.2d 384, 392 (Tex. App. - Houston [1st Dist.] 1987, no writ) (reaffirming that a punitive award will not be set aside as excessive unless it is "so large as to indicate that it is a result of passion, prejudice, or corruption, or that the evidence has been disregarded.")

Haslip did not reach the central issue posed by Celotex in this case: the due process limitations on multiple punitive damage awards for a single course of conduct. However, the Alabama system sanctioned in *Haslip* requires both trial and appellate courts reviewing a punitive damage award to consider "the existence of other civil awards against the defendant for the same conduct." 59 U.S.L.W. at 4162. Texas law provides no mechanism for consideration of other civil awards against the defendant. Thus, even though Celotex offered evidence of other punitive awards against it, App. G-K, there was no procedure under Texas law available to the courts below to vacate or reduce the punitive award against Celotex because of those other awards. As *Haslip* recognized, due process requires consideration of other such awards as a necessary check on the unlimited discretion of the factfinder.

The problems raised by repeated punitive awards based on a single course of conduct have been a source of concern for over twenty years, beginning with Judge Friendly's prophetic warning that "[t]he legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967). As mass tort litigation has grown, so has judicial concern over the fundamental unfairness caused by multiple punitive recoveries. *See* Celotex's Petition for Writ of Certiorari at pp. 14-

16. The Fifth Circuit's affirmance of the punitive award against Celotex in this case "with misgivings" is a clear signal that the lower courts are seeking guidance on the constitutional limits on multiple punitive awards against a single defendant. Yet Texas law is devoid of any limitations on the discretion of juries to repeatedly award punitive damages against companies such as Celotex. *Haslip* is a statement by this Court that due process requires more.[5]

The *Haslip* opinion also focused on the guidance the jury instruction given under Alabama law provided the jury in considering an award of punitive damages. The *Haslip* jury was told that the purpose of punitive damages was "not to compensate the plaintiff" but "to punish the defendant" and "for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future," and that the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." 59 U.S.L.W. at 4162. This instruction limited the jury's discretion to deterrence and retribution, the state interests sought to be addressed, because it enlightened the jury as to the nature and purpose of punitive damages and identified the damages as punishment for civil wrongdoing. *Id.*

The punitive instruction given the jury in this case is reprinted at Appendix M. Although the instruction does mention the goals of punishment and deterrence, the isolated reference to these purposes is so oblique as to be meaningless. In light of the repeated references to willful or reckless conduct in the instruction, the single mention of punishment is no more than a

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5 *Haslip* noted that the review conducted by the Alabama Supreme Court had "real effect" and did result in the reduction of punitive awards. 59 U.S.L.W. at 4162. In contrast, the factual review of punitive damage awards in Texas is limited to intermediate appellate courts, and the Texas Supreme Court, by statute, has no jurisdiction to review the excessiveness of punitive damage awards. *Tatum v. Preston Carter Co.*, 702 S.W.2d 186, 188 (Tex. 1986). The Texas Supreme Court is therefore unable to provide a source of effective and consistent review of punitive awards similar to the function served by the Alabama Supreme Court.

call for vengeance. The jury's discretion was not channeled toward the purposes the state sought to advance, but was left free to roam toward any extreme the jury may have found.

The jury was told to consider "the totality of the circumstances," but was also told that "you may consider the financial resources of the defendant in fixing the amount of [punitive] damages." This was a correct statement of Texas law. *See Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988). This is directly contrary to the Alabama rule reviewed in *Haslip*, which excludes evidence of a defendant's wealth. 59 U.S.L.W. at 4162. Unlike Alabama law, Texas plaintiffs are entitled by law to "enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.*

The constitutional calculus that must be undertaken in reviewing punitive awards is necessarily complex and imprecise. *Haslip* teaches that the guiding principles in such an analysis are "concerns of reasonableness and adequate guidance from the court." 59 U.S.L.W. at 4161. These due process requirements become magnified in the context of repeated punitive damage awards against a single defendant, a problem which has troubled the federal courts for a great many years. The very safeguards that provided constitutional validation for the Alabama system reviewed in *Haslip* were not afforded Celotex by the law or the courts of Texas. Due process requires more than Texas gives a defendant faced with serial punitive damage awards for a single course of conduct.

CELOTEX'S PETITION TO THIS COURT WAS TIMELY

Respondents allege, without argument or authority, that Celotex's petition to this Court was untimely. Celotex set forth in its Petition the facts that establish that the time for filing Celotex's petition under 28 U.S.C. § 2101(c) was extended by 11 U.S.C. § 108(c).

By its express language, 11 U.S.C. § 108(c) provides that if applicable nonbankruptcy law fixes a period for "continuing a civil action ... on a claim against the debtor," the period does not expire until thirty days after the automatic stay of 11 U.S.C. § 362 is terminated. Because Celotex was the defendant in the trial court, the proceeding before this Court is a continuation of a claim against a debtor. *See Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 62 (6th Cir. 1983); *Association of St. Croix Condominium Owners v. St. Croix Hotel*, 682 F.2d 446 (3rd Cir. 1982). The automatic stay in favor of Celotex was terminated by order of the bankruptcy court on January 10, 1991, App. F, and Celotex filed its petition within the time extended by 11 U.S.C. § 108(c).[6]

Respondents do not suggest any reason why 11 U.S.C. § 108(c) does not apply in this case. If a debtor such as Celotex is not allowed an extension of time, the "fresh start" policy of the Bankruptcy Code would be undercut because the debtor would be denied the time and opportunity to analyze the litigation against it and how to determine how those claims should be handled in the context of a reorganization. Celotex is entitled to the extension of time granted by Congress in § 108(c).

CELOTEX DID NOT JUDICIALLY ADMIT THE PRODUCT EXPOSURE OF ROY MARBLE

Respondents' argument on whether a statement by counsel for Celotex in closing argument constituted a judicial admission misses the crucial distinction between an unqualified statement of counsel, such as in *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S.261 (1880), and the use during closing argument of evidence admitted over objection, such as *Clark v. City of Los*

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6 Under § 108(c), the deadline for filing a certiorari petition was extended until Saturday, February 9, thirty days after the stay was terminated. Because of the weekend dates, the deadline was extended until Monday, February 11, 1991. Sup. Ct. R. 30.1; Bankr. R. 9006. Celotex filed its petition for writ of certiorari on that date.

Angeles, 650 F.2d 1033 (9th Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). *Clark* is the factually analogous precedent that should control in this case, and the decision below conflicts with *Clark*.

Respondents apparently recognize that the statement of counsel for Celotex was not an admission, for most of their argument is spent in trying to make the disputed product list admissible. Respondents suggest that the product list was admissible under Federal Rules of Evidence 804(b)(2), 804(b)(5), and 1006. None of those theories of admissibility were offered by Respondents in the trial court, and they cannot be raised at this late stage. Even if they could, they do not support admissibility of the list.

Rule 804(b)(2) allows an out-of-court statement to be admitted only if the declarant believed that his death was "imminent." There was no evidence at trial that Mr. Marble believed his death was imminent, and Respondents admit that the product list was prepared "for this lawsuit." Brief in Opposition at 16. The product list is not the type of death bed declaration required by Rule 804(b)(2). Rule 804(b)(5) is the catch-all exception that requires "guarantees of trustworthiness." Respondents offered no guarantees that the sources of information in the product list were reliable, and the trial judge recognized that the list had "a serious credibility problem." Tr. 1165. Rule 1006 allows the introduction of voluminous writings or recordings, but the product list is not a summary of any such documents.

Respondents also stress that Celotex failed to attack the reliability of the product list. This is a phantom issue that does not relate to judicial admissions or to admissibility. However, Celotex was unable to credibly attack the reliability of the product list because it had no chance to examine the original handwritten list, to cross-examine Mr. Marble, or to cross-examine the persons who provided the information on the list to Mr. Marble. It is precisely these inabilities that support the policies underlying the hearsay rule.

What Respondents did was to convince the trial court to allow an unverified, triple hearsay document into evidence, without giving Celotex any opportunity to test the truth of the document. Celotex was forced to admit the existence of that document during closing argument, and Respondents are now trying to use a trial by ambush as a judicial admission. There is nothing in the logic or history of judicial admissions in federal court that would condone such a result.

Respectfully submitted,

By: Robert Hayden Burns by bl

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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing has been forwarded to opposing counsel:

Mr. Rex Houston
Mr. Paul Sadler
Wellborn, Houston, Adkison,
Mann, Sadler & Hill
P. O. Box 1109
Henderson, Texas 75653-1109

by certified mail, return receipt requested on this 10th day of May, 1991.

Kevin F. Risley by b/v
Kevin F. Risley

APPENDIX M

The plaintiffs claim that the acts (previously defined) of each of the defendants was done willfully, intentionally, or with a callous or reckless disregard and indifference to the rights and welfare of the plaintiffs, and that such conduct entitles them to an award of punitive damages in addition to the compensatory damages.

I instruct you, that under the laws of Texas, a heedless and reckless disregard means more than a momentary thoughtlessness, inadvertence or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare or safety of the persons affected by it. In their claim for punitive damages, the plaintiffs claim, generally, that the defendants acting individually, or in conjunction with or in conspiracy with other asbestos manufacturing companies, willfully, intentionally, or with reckless indifference, withheld from the plaintiffs as well as from the public in general, information as to the dangers and potentially deadly nature of asbestos products, long after each of the defendants had actual knowledge of the dangers connected with the use of its products.

The plaintiffs also contend that this action on the part of the defendant, either individually or collectively, continued for many years and was knowingly designed by each of the defendants to cause the plaintiffs and their household members and other similarly situated workers to remain ignorant of the nature of their asbestos products.

If you find for the plaintiffs, and if you further find that any of the defendants did act with malice, willfulness, intentionally or with a heedless and reckless disregard or indifference to the rights of

others, the law would allow you, in your discretion to assess punitive damages against the defendant as punishment and as a deterrent to others.

In making your determination as to punitive damages, you will consider the totality of the circumstances and that you may consider the financial resources of the defendant in fixing the amount of such damages.

Tr. Vol. X, pp. 2488-2491.